1983 CASE DIGEST INDEX

Editor's Note: The cases in the Index have been classified to conform to the *Criminal Law Digest* (third edition).

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PART I—STATE CRIMES

3. NATURE AND ELEMENTS OF SPECIFIC CRIMES

§ 3.00. Arson

Nebraska Defendant was convicted of attempted arson for setting fire to paper goods and articles of clothing during a disturbance at a county jail in which he was confined; the fire filled the area with smoke and caused scorching of paint. On appeal, he argued that the crime of attempted arson requires proof of an intent to burn a structure, which cannot be demonstrated where, as here, the structure is constructed of fireproof material.

Held, conviction affirmed. The Nebraska Supreme Court rejected defendant's contention, finding it clear from the evidence that defendant intended to damage the jail and accomplished that result. The arson statute, it noted, required only damage to a structure as the result of fire, not a burning of the structure itself. A building need not be combustible to be damaged by fire, continued the court; scorching and smoke produced by a fire could be sufficient to cause damage, it said, suggesting that the evidence against defendant would have been sufficient to sustain a conviction for the completed crime of arson as well as the attempt. State v. Hohnstein, 328 N.W.2d 777 (1983), 19 CLB 485.

§ 3.45. Burglary

Colorado Defendant was charged with burglary of a dwelling and theft for taking a bicycle from the garage attached to a private residence. The trial court granted defendant's motion to dismiss the burglary charge on the ground that the garage was not a "dwelling" within the meaning of the burglary statute, which defined the term as a "building which is used, intended to be used, or is usually used by a person for habitation." The State appealed.

Held, reversed and remanded. The Colorado Supreme Court directed reinstatement of the charge. The statutory definition of a dwelling, it held, comprehended an entire building. It explained:

> [T]here is no room in the language of that clearly worded statute to exclude from the meaning of dwelling those parts of a residence that are not "usually used by a person for habitation." Moreover, at least some of the usual uses of a residential garage, including storage of household items, are incidental to and part of the habitation uses of the residence itself.

Accordingly, it found that the burglary charge had been dismissed improperly. People v. Jiminez, 651 P.2d 395 (1982), 19 CLB 392.

South Dakota Defendant was convicted of burglary for stealing property from the open cargo "box" of a pickup truck. On appeal, he disputed that the reaching into such an open, uncovered area constituted "entry into a structure" within the meaning of the burglary statute. The term "structure" was statutorily defined as "any house, building, outbuilding, motor vehicle, watercraft, aircraft, railroad car, truck, trailer, tent or other edifice, vehicle or shelter, or any portion thereof. . . ."

Held, conviction affirmed. The South Dakota Supreme Court rejected defendant's argument that the burglary statute protected only fully enclosed spaces. The absence of a physically confining barrier, it held, did not remove the truck's cargo area from the ambit of the statute, noting that "the legislature manifested its intention to protect more than enclosed structures by including 'any portion thereof' in its definition of structure." State v. Cloud, 324 N.W.2d 287 (1982), 19 CLB 275.

§ 3.55. —Necessity for breaking and entering

North Carolina Defendant, convicted of burglary, argued on appeal that the evidence of a "breaking" into the subject premises was insufficient to sustain the conviction.

At trial, it was established that the rear door of the premises had been locked for the night and further secured by a two-by-four braced under the doorknob. The following morning, it was discovered that the lock had been pried open; however, the two-by-four was still in place and the door was no more than two inches ajar.

Held, affirmed. The North Carolina Supreme Court noted that "any act of force, however slight, employed to effect an entrance

through any usual or unusual place of ingress . . ." amounts to a "breaking." Even if defendant was interrupted or abandoned his criminal purpose before actually entering the premises, it continued, the act of dislocating the door from its locked position completed the offense. State v. Myrick, 291 S.E.2d 577 (1982), 19 CLB 79.

§ 3.85. —Possession

Texas Defendant, convicted of possession of heroin, argued on appeal that the evidence of "possession" was insufficient to sustain the verdict. At trial, it was established that defendant was among fifteen people in an apartment when police officers executed a search warrant at the premises. During the search, capsules containing heroin were found in a wastebasket in the kitchen; defendant had been nearest the wastebasket when the officers entered.

Held, conviction reversed, and defendant ordered acquitted. The Texas Court of Criminal Appeals, en banc, said that to establish unlawful possession of a controlled substance such as heroin two elements must be proven:

> (1) that the accused exercised care, control, and management over the contraband, and (2) that the accused knew the matter possessed was contraband.

While possession need not be exclusive and evidence which shows that the accused jointly possessed the substance may serve as the basis for a conviction, the court observed that more than mere presence at the scene is required to make an individual party to joint possession. Here, found the court, only "close proximity" connected the drugs to defendant; this circumstance, it held, was not sufficient to sustain the conviction. Oaks v. State, 642 S.W.2d 174 (Crim. App. 1982), 19 CLB 490.

§ 3.110. Family offenses

§ 3.115. —Child abuse

New Mexico Defendant was the mother of two children—Arthur, almost five years old and Jose, six months old. Defendant gave birth to Arthur when she was sixteen years old. Two years later, Arthur's father died. About six months later, defendant met Eddie Lucero, and defendant and Lucero began living together, however, they never married. Defendant testified that Lucero beat her, however, defendant continued to live with him. Neither defendant nor Lucero were employed. They lived on defendant's income, which came from public assistance. Defendant testified she would never give Lucero any of her money, thus he beat her up.

After defendant gave birth to Jose, Lucero's child, Lucero began hitting Arthur. Defendant admitted knowing about this, but denied seeing the abuse take place. She said she could not contact the police or get help for Arthur because Lucero threatened her and Arthur. Defendant was convicted of child abuse and she appealed on the ground that the relevant statute was unconstitutional because it imposed strict liability for endangering a child's life or health or letting a child be tortured, cruelly confined, or cruelly punished.

Held, conviction sustained. The New Mexico Supreme Court agreed that the statute provided criminal sanctions for a defendant's unlawful acts without requiring proof of criminal intent and, accordingly, imposed strict criminal liability. However, it stated, the legislature "may forbid the doing of an act and make its commission criminal without regard to the intent of the wrongdoers" and "the general presumption is in favor of upholding such a statute."

The rationale for a strict liability criminal statute, explained the court, is that public interest is the subject matter of the offense, or the potential for public harm, and that it is so great as to override individual interests. The public interest inherent in preventing cruelty to children, held the court, justified the strict liability aspect of the child abuse statute. State v. Lucero, 647 P.2d 406 (1982), 19 CLB 180.

§ 3.130. Firearms violations

§ 3.140. —Dangerous and deadly weapons

Indiana Defendant was convicted by a jury of criminal confinement for abducting the complainant "while armed with a deadly weapon." At trial, it was established that he forced the complainant into his van at gunpoint, blindfolded her, and drove her around for several minutes before releasing her unharmed. The gun, a .177 caliber pellet gun resembling a .45 caliber automatic, was recovered at the time of his arrest. Defendant argued on appeal that the pellet gun, which fired metal pellets by means of compressed gas, was a "toy" and not a deadly weapon, which, by statutory definition, included any "weapon which in ordinary use is readily capable of causing serious bodily injury

which includes 'serious permanent disfigurement, unconsciousness, extreme pain, or permanent or protracted loss or impairment of a bodily member or organ.'"

Held, affirmed. The Indiana Supreme Court stated that while "different conclusions can be reached as to whether or not the weapon is deadly, it is a question of fact for the jury to determine from a description of the weapon, the manner of its use and the circumstances of the case."

Here, it found, the jury verdict was not contrary to the evidence from which it could be inferred that the pellet gun, if discharged at a person at close range, could cause "extreme pain and even the loss or impairment of hearing or sight." Glover v. State, 441 N.E.2d 1360 (1982), 19 CLB 390.

§ 3.145. Forgery

Delaware Defendant was convicted of forgery pursuant to a statute which read, in pertinent part, as follows:

> A person is guilty of forgery when, intending to defraud, deceive, or injure another person, or knowing that he is facilitating a fraud or injury to be perpetrated by anyone, he:
>
> * * *
>
> Makes, completes, executes, authenticates, issues, or transfers any written instrument which purports to be the act of another person, whether real or fictitious, who did not authorize that act. . . .

At trial, it was established that he attempted to cash a check purportedly indorsed by the payee, knowing that it was in fact indorsed by a third party who had stolen it and requested that defendant cash it. The liquor store clerk to whom defendant presented the check, however, refused to cash it and returned it to defendant.

On appeal, it was argued that defendant had not successfully "transferred" the check and accordingly could not be convicted of the crime of forgery.

Held, conviction affirmed. The Delaware Supreme Court concluded that "physical delivery of the check for cashing is sufficient under the forgery statute to constitute transferring the instrument."

While the term "transfer" was not defined in the statute, the court, in reviewing the legislative history, concluded that it was intended to equate with the familiar concept of "uttering," i.e., the "offer of a check to a person . . . whether it be accepted by that person or not." Accordingly, the court ruled that defendant's delivery of the check for cashing amounted to a transfer and was thus sufficient to make out the crime. Bailey v. State, 450 A.2d 400 (1982), 19 CLB 273.

§ 3.175. Homicide

§ 3.180. —Proximate cause

Mississippi Defendant, convicted of manslaughter, argued on appeal that the evidence was insufficient to prove that the victim's death was caused by a criminal agency. At trial, a physician had testified that death resulted from "an overwhelming infection secondary to [the victim's] injuries," the injuries being gunshot wounds inflicted several days earlier.

Held, affirmed. The Mississippi Supreme Court concluded that in a homicide prosecution, an accused's unlawful act need not be the sole cause of death. It is sufficient, said the court, if the accused's actions contributed to the victim's death; an accused would not be relieved from criminal responsibility if his actions contributed to the victim's death, it explained, even if other contributing causes were present. Here, the court found that the evidence established the gunshot wounds as a "substantial contributing cause of death." Holliday v. State, 418 So. 2d 69 (1982), 19 CLB 182.

§ 3.200. Manslaughter

§ 3.205. —Proximate cause

Pennsylvania Defendant was convicted of involuntary manslaughter for her "failure to comply with an alleged duty to seek medical assistance . . . for her husband, when he was stricken with a diabetic crisis which proved fatal." Defendant's husband, a thirty-four-year-old diabetic, had publicly pronounced his desire to discontinue a seventeen-year regimen of insulin treatments in the belief that God would heal his condition.

At trial, it developed that the deceased, defendant, and a co-defendant had entered into a pact to enable the deceased to resist the temptation to self-administer insulin. The deceased's condition worsened and after several days, he died of diabetic ketoacidosis.

The jury verdict was set aside by the trial court but reinstated by an intermediate appellate court.

Held, order reversed and defendant discharged. The Pennsylvania Supreme Court stated that defendant had no duty to seek medical attention for her spouse under the circumstances of the case. While recognizing that other jurisdictions had recognized a limited spousal duty to seek medical attention when a stricken spouse unintentionally became helpless, it found that here the deceased had rationally and consciously denied himself medical aid. Thus, "assuming that one spouse owes the other a duty to seek aid when the latter is unwillingly rendered incompetent to evaluate the need for aid, or helpless to obtain it, that duty would not have been breached under the facts presented."

As, under the circumstances, no duty was present and breached, defendant's failure to seek medical assistance could not serve as the basis for criminal liability, concluded the court. Commonwealth v. Konz, 450 A.2d 638 (1982), 19 CLB 273.

§ 3.220. Murder

Alabama Defendant was convicted of recklessly causing the death of her infant daughter by withholding food and medical attention from the child. The statute under which defendant was charged provided that "a person commits the crime of murder if: 'Under circumstances manifesting extreme indifference to human life, he recklessly engages in conduct which creates a grave risk of death to a person other than himself, and thereby causes the death of another person.'"

Defendant contended on appeal that there should be a reversal because, inter alia, reckless murder was a crime of "universal malice" while the criminal acts charged against her were directed solely at her deceased child.

Held, reversed and remanded. The Court of Criminal Appeals found that the statute required conduct showing an extreme indifference to human life in general and not toward a particular individual only; the reckless homicide statute, continued the court, applies to cases where an accused has no deliberate intent to kill or injure a particular victim (e.g., shooting a firearm into a crowd). While defendant's conduct

> evidence[d] an extreme indifference to the life of her child, there was nothing to show that the conduct displayed an extreme indifference to human life generally. Although the defendant's conduct created a grave risk of death to another and thereby caused the death of that person, the acts of defendant were aimed at the particular victim and no other. Not only did the defendant's conduct create a grave risk of death to only her daughter and no other, but the defendant's actions (or inactions) were directed specifically against the young infant.

Therefore, the evidence did not support a conviction for reckless murder. Northington v. State, 413 So. 2d 1169 (1982), 19 CLB 80.

§ 3.275. Kidnapping

Nevada Defendant, convicted of battery and kidnapping, argued on appeal that the evidence was insufficient to make out the separate offense of kidnapping.

At trial, it was established that defendant and two companions forced the complainant into their pickup truck and drove her to a deserted area, where they slashed her with a knife and pushed her to the ground, knocking her unconscious. She regained consciousness, alone, several hours later.

Held, affirmed. The Nevada Supreme Court ruled that "[a] separate charge of first-degree kidnapping is proper if the movement of the victim is not merely incidental to the associated offense and it results in substantially increased risk of harm."

Here, the uncontroverted evidence that the complainant was left unconscious, in an abandoned spot, was sufficient to support the jury's findings that the movement was more than incidental to the battery and substantially increased the risk of harm to her. It thus concluded that the kidnapping conviction was justified. Curtis D. v. State, 646 P.2d 547 (1982), 19 CLB 178.

§ 3.285. Larceny

Hawaii Defendant, convicted of theft for stealing a calculator from the counter of a dry cleaning store, argued on appeal that there was a fatal variance between the pleading and the proof at the trial. Although the indictment stated that the calculator was the property of Setsuko Yokoyama doing business as Kalakaua Kleaners, it developed at trial that Kalakaua Kleaners, a corporation, was the actual owner.

Held, conviction affirmed. The Hawaii Supreme Court ruled that particular ownership of the property stolen is not an element of the crime of theft. It was not disputed, said the

court, that the calculator was not defendant's, but was the property of another, and:

> It has long been settled that where the offense is obtaining control over the property of another, proof that the property was the property of another is all that is necessary and the naming of the person owning the property in the indictment is surplusage.

Accordingly, the court found no fatal variance between the charge and the proof. State v. Nases, 649 P.2d 1138 (1982), 19 CLB 272.

Idaho Defendant and another were observed taking money from parking meters and were summarily arrested. Police obtained a search warrant for their auto and recovered approximately $46 from the glove compartment, $65 from a suitcase on the rear seat, and $183 from a bag in the trunk. The recovered money, all of which was in the form of loose change, was aggregated and defendant was charged and convicted of grand larceny for stealing in excess of $150. On appeal, he contended that it was error to aggregate the monies.

Held, affirmed. The Supreme Court of Idaho stated, "The general rule regarding aggregation of values is that before the state can aggregate amounts taken from the same person in separate incidents for the purpose of charging grand larceny, it must show that the amounts were obtained pursuant to a common scheme or plan that reflected a single, continuing larcenous impulse or intent."

Here, it found, defendant had a key which fit the parking meters, was seen taking money from several, and admitted coming to town for that purpose. This evidence was sufficient to establish that the money was stolen "pursuant to a common scheme or plan reflecting a single, continuing larcenous impulse or intent." Accordingly, concluded the court, it was proper to aggregate the monies. State v. Lloyd, 647 P.2d 1254 (1982), 19 CLB 179.

§ 3.330. Obstruction of justice

South Dakota Defendant, convicted of obstructing a law-enforcement officer, argued on appeal that the evidence was insufficient to sustain the conviction because he did not forcibly interfere with the officer.

Defendant had been part of a crowd of approximately twenty-five people observing police subdue and arrest several other individuals for disturbing the peace. Some of the persons in the crowd became unruly and police attempted to break up the mob. An officer approached defendant and told him to move; defendant replied that "he had a right as a citizen to be there." The officer repeated his direction twice more and defendant then took a few steps backwards, remaining in the vicinity for an additional five to seven minutes. An information was subsequently filed, charging defendant with obstructing the officers.

Held, affirmed. The South Dakota Supreme Court ruled that the crime of obstructing a police officer did not apply only to situations where the obstruction was accomplished by the use of direct force on the officer. It stated that a threat to use "violence, force, physical interference, or obstacle would be sufficient to establish a violation of the statute."

Here, in a face-to-face confrontation, defendant refused to obey the officer's direct order and move from the officer's path; the court found that this refusal amounted to a physical interference with the officer's attempt to disperse the unruly mob and preserve the peace and, therefore, was sufficient to establish the obstruction charge. State v. Wiedeman, 321 N.W.2d 539 (1982), 19 CLB 176.

§ 3.375. Robbery

New York Defendant was indicted for robbery, stealing money and jewelry from the complainant at gunpoint. At trial, defendant admitted going to the complainant's apartment on the occasion in question, but testified that he stole only cocaine from the complainant when she refused to sell him drugs on credit; he also denied that he was armed. Over defendant's objection, the trial court charged the jury that they could return a verdict of guilty on the robbery charge if they found that defendant forcibly stole drugs, rather than money and jewelry, from the complainant.

Defendant was convicted of the robbery and contended, on appeal, that the trial court's charge amounted to an improper amendment of the indictment in that it modified an essential element of the crime.

Held, affirmed. The court of appeals stated that the particular nature of the property stolen is not an essential element of the crime of robbery; robbery, it stated, requires merely the forcible taking of "property."

Here, it stated, the indictment comported with statutory and constitutional standards of due process and fair notice by informing defendant that he was accused of forcibly stealing property from a named person at a specific time

and place. These allegations were supported by the prosecution's proof at trial; defendant had no grounds for complaint that he was misled as to the property stolen, since any variance between the pleading and the proof was created when defendant voluntarily took the stand and admitted that he had committed a "different version" of the crime charged. Accordingly, the New York Court of Appeals affirmed defendant's conviction. People v. Spann, 438 N.E.2d 402 (1982), 19 CLB 174.

§ 3.380. —Armed

Connecticut Defendant was convicted of the armed robbery of three restaurants. At trial, employees of the restaurants testified that during the course of the crimes, defendant held a long bulging object, which they assumed was a gun, under his sweatshirt. Defendant took the stand in his own behalf and admitted to one of the robberies but claimed that the object he carried was a hammer.

On appeal, he asserted that the evidence was insufficient to convict him under the statute, which provided that an armed robbery is committed by the display or threatened use of what is represented by words or conduct to be a firearm.

Held, conviction affirmed. The Connecticut Supreme Court found that the witnesses' observations satisfied the state's burden of proof. It was apparent, said the court, that the jury "exercised their right not to believe the accused's version of [the robbery] and chose to believe the state's evidence that eyewitnesses assumed he was carrying some sort of firearm." State v. Bell, 450 A.2d 356 (1982), 19 CLB 275.

§ 3.390. Sex crimes

North Carolina Defendant, an adult, was convicted of a sex offense for engaging in a sex act with a child who was twelve years, eight months old at the time of the incident. The statute under which defendant was charged stated that "[a] person is guilty of a sexual offense in the first degree if the person engages in a sexual act: (1) [w]ith a victim who is a child of the age of 12 years or less. . . ."

Defendant argued on appeal that the age element had not been satisfied because the victim, having passed his twelfth birthday, was no longer "of the age of twelve years or less."

Held, judgment arrested. The North Carolina Supreme Court agreed with defendant's interpretation of the statute and rejected the state's contention that one is twelve years old until reaching one's thirteenth birthday. It found that the language of the statute did not evidence a clear legislative intent to extend protection to children who had passed their twelfth birthday but not reached their thirteenth birthday.

Thus, following the principle that "criminal statutes are to be construed strictly against the state and liberally in favor of the defendant," the court arrested the judgment. State v. McGaha, 295 S.E.2d 449 (1982), 19 CLB 272.

5. PARTIES

§ 5.00. Principals

South Carolina Defendant, convicted of the armed robbery of a grocery store, argued on appeal that there should be a reversal because he was not present at the store when the robbery was committed.

At trial, it was established that defendant and several others planned the crime and that defendant provided the others with guns, masks, and gloves. He then drove them to the store, leaving the scene himself prior to the robbery; the defendant and the others later met at a predesignated location and divided the proceeds.

Held, affirmed. The South Carolina Supreme Court held that a defendant's physical presence during a crime is not required to sustain his conviction as a principal, stating that:

> [W]hen several people pursue a common design to commit an unlawful act and each takes the part agreed upon or assigned to him in an effort to insure the success of the common undertaking, ". . . the act of one is the act of all and all are presumed to be present and guilty. . . ." [Citation omitted].

Here, found the court, defendant's liability as a principal was established by evidence showing that he participated in planning the robbery, supplied the instrumentalities, and shared in the proceeds. State v. Chavis, 290 S.E.2d 412 (1982), 19 CLB 86.

6. DEFENSES

§ 6.00. Alibi

Arkansas Defendant was convicted of murder for shooting the victim to death during the rob-

bery of a motel. He asserted an alibi defense. To refute the alibi, the prosecution produced a witness who was allowed to testify that defendant had robbed him at gunpoint less than an hour earlier, at his place of employment, another motel several blocks from the murder scene.

On appeal, defendant argued that the witness should have been permitted to testify only as to the time and place at which he observed defendant, and not as to the facts of the robbery itself.

Held, affirmed. The Arkansas Supreme Court ruled that the witness's testimony was clearly relevant to disprove defendant's alibi; it held that "[t]he admissibility of testimony about another crime, to rebut a defense of alibi, is uniformly recognized" because it is not admitted merely to show an accused's bad character.

The court noted that it would have been "unrealistic" to restrict the witness's testimony as defendant suggested; had the testimony been so diluted, it went on to point out:

> [T]he jury would have received a false impression about the incident and might well have doubted whether [the witness] could identify a stranger whom he saw casually as he was closing up for the night. It was the very fact that [defendant] used a weapon in an attempt at robbery that would fix the incident in [the witness's] memory and strongly support his identification of [defendant]. The probative value of that important fact heavily outweighed any prejudice to [defendant] from the proof that he had drawn a gun on [the witness].

Williams v. State, 635 S.W.2d 265 (1982), 19 CLB 181.

§ 6.25. Immunity from prosecution

Georgia Defendant, charged with possession and sale of methaqualone, moved to quash the indictment on the ground that the district attorney had granted him transactional immunity. Defendant had been arrested on the charges in 1979. In exchange for furnishing information relating to drug and gambling investigations, the prosecutor gave defendant a letter that purportedly conferred immunity from prosecution on defendant for all violations of the law that occurred in the prosecutor's jurisdiction prior to September 8, 1980, the date of the letter. The letter was initialed by the judge before whom defendant's drug case was pending, and the charges were dismissed.

Thereafter, the district attorney was defeated for reelection and his successor presented the dismissed drug case to the grand jury, which returned an indictment against defendant. The trial court refused to grant defendant's motion; the intermediate appellate court reversed, holding that "the promises of the public prosecutor and the public faith pledged by him must be kept."

Held, dismissal of indictment affirmed. The Georgia Supreme Court, while holding that there was no statutory or common-law basis for the prosecutor's promise of transactional immunity, stated that a "prosecutor has, with court approval, the power to promise to forego prosecution, [but] this promise must be limited to prosecution as to specific crimes or transactions." The agreement between defendant and the district attorney, it found, was overbroad because, in substance, it covered all crimes known and unknown; nevertheless, said the court, the agreement was valid and enforceable as to the known crimes that were the subject of the indictment.

Further, it decided that to maintain the integrity of the district attorney's office, it was essential that the agreement be binding upon the district attorney's successor. Accordingly, it concluded, the indictment should be quashed. State v. Hanson, 295 S.E.2d 297 (1982), 19 CLB 267.

§ 6.55. Self-defense

Arkansas Defendant was convicted of a double murder. He admitted to the shootings but claimed self-defense and argued on appeal that the trial court erroneously excluded evidence of certain specific acts of violence committed by the victims.

The trial court had admitted evidence of the reputation for violence of the decedents and prior specific violent acts known to defendant, but refused to allow evidence of their specific violent acts of which defendant was not aware at the time of the shootings.

Defendant asserted on appeal that even if he did not know of the specific violent acts, the excluded evidence was probative on the issue of who was the aggressor.

Held, affirmed. The Arkansas Supreme Court noted that evidence relating to the victims' aggressive character, including evidence of prior specific acts, was admissible in support

of defendant's self-defense claim to the extent that it bore on defendant's state of mind at the time of the shootings. Evidence of prior specific violent acts unknown to defendant at the time of the incident, continued the court, could not be probative on that issue; accordingly, it held, the trial court's ruling was correct. Halfacre v. State, 639 S.W.2d 734 (1982), 19 CLB 383.

West Virginia Defendant, convicted of battery, argued on appeal that there should be a reversal because the jury was incorrectly instructed on self-defense. Defendant, a union leader and the complainant, a county prosecutor, had an argument at the latter's office following a meeting with regard to a labor dispute at a county hospital. Defendant refused to comply with several requests to leave and a fight ensued after he allegedly cursed the complainant and urged his followers to take over the office.

Over defendant's objection, the trial judge instructed the jury that self-defense was not available to a defendant who engaged in misconduct, either by physical act or violent indecent language, calculated to provoke a breach of the peace. The "peace," explained the judge, "meant the tranquility enjoyed by the citizens of a municipality or community where good order reigns among its members."

Held, conviction reversed; verdict set aside and new trial awarded. The West Virginia Supreme Court stated that the general common-law principle is that self-defense cannot be claimed by a defendant who intentionally provokes a fight; the provocation, it suggested, could consist either of words or physical acts.

Here, however, the trial judge's instruction, in substance, implied that indecent language that disturbed the "tranquility" of the community would be insufficient to deprive defendant of his self-defense claim. State v. Smith, 295 S.E.2d 820 (1982), 19 CLB 269.

PART II—STATE CRIMINAL PROCEDURES, ANCILLARY PROCEEDINGS

8. PRELIMINARY PROCEEDINGS

§ 8.00. Grand jury proceedings

§ 8.05. —Subpoena

Wisconsin Respondent, a ten-year-old girl, was subpoenaed to testify against her mother in the latter's trial for murder and child abuse; her mother was charged with killing respondent's younger sister and with acts of abuse against respondent herself. Respondent's guardian ad litem moved to quash the subpoena, on the ground that she was "of such tender years and in such a psychological and emotional state that requiring her to testify creates a probability of psychological damage to her far outweighing the probative value of any testimony she may give."

The trial court directed a hearing, and after taking testimony from a psychiatrist, a social worker, and respondent's foster mother, concluded that "it would probably do great [emotional] harm to [respondent] if she were required to testify"; accordingly, the court ordered the subpoena quashed. The state then appealed.

Held, order quashing the subpoena vacated and case remanded. The Wisconsin Supreme Court noted that the case presented a conflict between the best interests of the child-witness and well-accepted legal principles:

> [T]he well-accepted legal principle, a fundamental tenet of our modern legal system, is that the public has a right to every person's evidence except for those persons protected by a constitutional, common-law, or statutory privilege.
>
> * * *
>
> The principle and its corollary—that each person has a duty to testify—are basic to the adversary system. The integrity of the legal system depends on the court's ability to compel full disclosure of all the relevant facts under the rules of evidence. The theory of the adversary system is that examination of all persons who have relevant information will develop all relevant facts and will lead to justice. [Citations omitted.]

Other than in child custody cases, in which the policy considerations were different from those underlying criminal prosecutions, it found no authority or precedent for excusing a witness completely from his obligation to testify because of potential emotional harm.

Here, the court found that concern for the child's well-being should yield to concern to protect the child and society from further injury

or bringing to trial the child's abuser; "excusing [respondent] from testifying might spare her stress now but might harm her in the long run by failing to allow the state to bring to trial and possible conviction the alleged abuser."

Nevertheless, the court directed that the child witness be given the maximum protection consistent with the public interest in bringing the accused to trial and held the trial judge, prosecutor, and defense counsel responsible "to use their collective intellectual resources to devise a way so that [respondent] testifies with minimal trauma." State v. Gilbert, 326 N.W.2d 744, 19 CLB 387.

§ 8.50. Prosecutor's discretion to prosecute

Texas Defendant was arrested for unlawful possession of a firearm. Because the arresting officer knew defendant had been convicted of a felony previously, the weapons charge was filed as a felony initially but then reduced to a misdemeanor when the prior conviction was erroneously overlooked during booking.

When defendant was sentenced to imprisonment on an outstanding but unrelated intoxicated driving charge, the weapons case was dismissed by the prosecutor; the dismissal was not part of a plea bargain. Subsequently, defendant applied for and received an early release from prison. The officer who had arrested defendant on the weapons violation, learning of his early release, rearrested him for the same incident, again filing it as a felony.

Defendant was indicted and convicted of the felony weapons offense; he brought a habeas corpus action, alleging that the second prosecution on the charge was motivated by prosecutory vindictiveness. Defendant claimed that he was prosecuted a second time because of his early release from the intoxicated driving sentence. Defendant's application was denied and he appealed.

Held, writ of habeas corpus denied. The Texas Court of Criminal Appeals, en banc, relying on United States v. Goodwin, — U.S. —, 102 S. Ct. 2485, 73 L. Ed. 2d 74 (1982), stated that where charges pending against an accused are increased pretrial, the accused has the burden of establishing prosecutory vindictiveness. It found distinguishable a line of cases, cited by defendant, holding that a presumption of vindictiveness exists when an increased sentence is imposed upon a defendant after retrial following a successful appeal.

Here, it appeared from the record that the original felony charge was valid and had been reduced because of a clerical error. The fact of the subsequent reinstatement of the felony charge, without more, was not sufficient to discharge defendant's burden of proof. *Ex parte* Bates, 640 S.W.2d 894 (Crim. App. 1982), 19 CLB 382.

10. PRETRIAL MOTIONS

§ 10.00. Motions addressed to sufficiency of indictment

§ 10.15. —Severance

Rhode Island Defendant, convicted of murder, argued on appeal that he was entitled to a new trial because the court below refused to grant his motion to sever his case from that of two co-defendants.

Defendants Tavares and Matera were tried jointly for the murder. The prosecutor established that the three had engaged in an argument with the deceased immediately before the killing and that Tavares was seen holding the murder weapon, an icepick, immediately after; however, no witness saw the actual stabbing.

Tavares took the stand in his own defense and testified that defendant stabbed deceased. Defendant, who did not testify, was subsequently convicted.

Held, reversed and remanded. The Rhode Island Supreme Court stated that "[a] defendant's right to a fair trial is sufficiently threatened so as to warrant severance when he and his codefendant present antagonistic defenses." A real, substantial, and irreconcilable conflict, it suggested, made it likely that the jury would determine guilt based upon the conflict alone.

Here, by denying the motion for severance, the trial court forced defendant to face the accusations of his co-defendant as well as of the state; defendant was thus unable to rely on the absence of eyewitness testimony to the slaying as his defense. The resulting prejudice to defendant, ruled the court, was severe enough to warrant a new trial. State v. Clarke, 448 A.2d 1208 (1982), 19 CLB 175.

12. GUILTY PLEAS

§ 12.40. Equivocal guilty plea

§ 12.50. —Court's failure to advise defendant of consequences of plea

Louisiana Defendant was convicted of burglary on his plea of guilty. He argued on appeal

that there should be a reversal and a reinstatement of his plea of not guilty because the trial court had not advised him fully of the rights he was waiving by entering a guilty plea. The record disclosed that the court had not advised defendant of his "right to a jury trial, his right to confront his accusers, and of his privilege against self-incrimination or make any inquiry as to his understanding of these rights and that by pleading guilty he was waiving them."

Held, conviction reversed and remanded for defendant to enter a new plea. The Louisiana Supreme Court found that the plea colloquy did not comport with the requirements of Boykin v. Alabama, 395 U.S. 328, 89 S. Ct. 1709 (1969), as the trial court failed to determine that defendant understood the full scope of his constitutional rights and the consequence of his guilty plea. Accordingly, the court continued, it could not be said that defendant had expressly and knowingly waived those rights. State v. Godejohn, 425 So. 2d 750 (1983), 19 CLB 484.

13. EVIDENCE

ADMISSIBILITY AND WITNESSES

§ 13.20. Relevancy and prejudice

Maine Defendant, convicted of armed robbery, argued on appeal that there should be a reversal because a shotgun found in his presence at the time of arrest was improperly admitted into evidence at trial.

Defendant was identified two days after the robbery from photographs. Police proceeded to his girlfriend's apartment, where they found defendant asleep on a bed. On the floor, partially protruding from beneath the bed, was a shotgun; police seized the weapon and arrested defendant.

At trial, witnesses stated that defendant was armed with a rifle or shotgun when he committed the robbery and generally described the weapon. The shotgun seized at the time of defendant's arrest matched the witness's description, but the prosecution offered it into evidence without making a direct effort to authenticate it as the weapon used during the crime; the shotgun was admitted over defendant's objection that its probative value was outweighed by its prejudicial impact on the jury.

Held, affirmed. The Supreme Judicial Court of Maine found that the trial judge had properly ruled that the shotgun was relevant to the issue of defendant's identity. It was rational, stated the court, to infer that defendant "committed the crime because he was later found to be in possession of a weapon meeting the general description of that used in the commission of the theft." To lay a proper foundation for admission of the weapon, the court continued, it was not required that it be directly and unequivocally identified as the gun used by defendant during the crime; a sufficient foundation was established by the witness's description.

The danger of prejudice was not great, suggested the court, because the jury's reason would not likely have been overcome by the sight of the shotgun; neither would the jury have likely drawn an improper inference concerning defendant's character or criminal propensities from his possession of such a weapon.

Accordingly, it ruled, the trial judge had acted within his discretion in admitting the shotgun into evidence. State v. Forbes, 445 A.2d 8 (1982), 19 CLB 87.

Maryland Defendant, convicted of armed robbery, burglary, and related crimes, argued on appeal that the trial court erroneously refused to permit evidence that he lacked the requisite intent.

It was alleged that defendant and Byrd had forcibly entered the Owsik residence, threatened Mrs. Owsik with guns, and removed various items of property. Defendant contended at trial that he and Byrd had been recruited by Walker, who told them that the purported crime had been planned by Mr. Owsik, who intended to submit fake insurance claims.

The trial court refused to allow defendant and his witnesses, Byrd and Walker, to refer to the alleged insurance fraud during their testimony, ruling that it was irrelevant.

Held, reversed and remanded. The Maryland Court of Appeals held that defendant was entitled to a new trial, stating that evidence tending to show defendant's intent, as well as the property owner's consent or lack of consent, was relevant and admissible.

Here, defendant had offered testimony tending to establish that he lacked intent to commit robbery and burglary because he intended to enter and take property from the Owsik residence with the owner's consent; thus, while he may have intended to participate in an insurance fraud, he lacked intent required to commit the crimes for which he was tried. Accordingly, it held that evidence concerning the in-

surance scheme should have been admitted. Leeson v. State, 445 A.2d 21 (1982), 19 CLB 89.

§ 13.40. Best evidence rule

Arkansas Defendant, a county tax collector, was convicted of theft for embezzling public funds, and malfeasance in office. In calculating the amount of the theft, a team of auditors spent 3,700 hours over a nine-month period examining books and records maintained by defendant's office. At trial, a member of the audit team was permitted to summarize the audit findings from work sheets. Defendant argued it was error to allow such testimony without first introducing the original documents.

Held, conviction affirmed. The Arkansas Supreme Court ruled that the contents of the voluminous documents, which cannot be presented in court conveniently, may be received in summary form. Here, it noted, hundreds of original documents had been examined by the auditors, who recorded their findings on work sheets; both the original documents and work sheets were made available to defendant for discovery and inspection. Accordingly, it concluded, the summary nature of the auditor's testimony was proper. Mhoon v. State, 642 S.W.2d 292 (1982), 19 CLB 490.

§ 13.45. Character and reputation evidence

Missouri Defendant, convicted of rape and kidnapping, argued on appeal that there should be a reversal because the trial court erroneously excluded evidence relating to the victim's prior sexual conduct. Defendant had testified at trial in his own behalf, asserting that the sexual activities were consensual. The complaining witness, he stated, had told him at that time that she was having sexual problems with her boyfriend.

Defendant then sought to introduce evidence that the complainant had told medical personnel who examined her after the alleged rape that she had engaged in sex with her boyfriend earlier that same evening; he also called the boyfriend and attempted to question him on the same subject. The trial court refused to permit those lines of inquiry, holding that it was inadmissible under the state's "rape shield" law.

On appeal, defendant asserted that the evidence was probative of "motive to have sex, motive to lie, and motive to go to a hospital [fear of pregnancy]."

Held, conviction reversed and case remanded. The Missouri Supreme Court found that the "rape shield" law creates only a presumption that evidence of a victim's prior sexual conduct is irrelevant. The statute, the court continued, provides for exceptions and permits a trial judge to admit such proof if it is relevant to a material fact or issue, or is evidence of the "immediate surrounding circumstances of the alleged crime."

Here, the evidence proffered by defendant went to the "immediate surrounding circumstances" of the alleged rape and was "highly probative of the issues of consent and [defendant's] mental state." It stated:

> The evidence was not offered to show a general inclination to have a sexual experience, but, rather to prove a specific motive. That it may have been inflammatory is outweighed by the fact that this evidence was extrinsic to defendant's own testimony, tending to corroborate that testimony and concerned statements and sexual acts that occurred in very close temporal proximity to the alleged rape.

Finding that the excluded evidence was probative of consent, an element common to both the rape and kidnapping charges, the court reversed both convictions and remanded for a new trial. State v. Gibson, 636 S.W.2d 956 (1982), 19 CLB 269.

Virginia Defendant was convicted of murder for fatally shooting his father; he claimed self-defense. On appeal, he argued that the trial court erroneously excluded evidence of his good character, as follows:

> [Defense Attorney]: Are you aware of the defendant's general reputation for violent behavior in the community?
> [Witness]: Yes, sir.
> [Defense Attorney]: And what is that reputation?
> [Witness]: He has no reputation for violent behavior in the community.
> [Prosecutor]: Well, I would object to that.
> [Court]: The reputation for violence in the community of the victim is admissible to explain the reaction of the defendant at the time. But the defendant's reputation for violence is not admissible. So I'll sustain that objection.

The state argued that (1) defendant did not make a proper offer of proof since "proof that defendant did not have any reputation for violence is not the equivalent of having a reputa-

tion for being a peaceable, law-abiding citizen"; (2) the character evidence was irrelevant because defendant admitted the physical act of shooting his father; and (3) the error, if any, was harmless.

Held, reversed and new trial ordered. The Virginia Supreme Court stated that an accused may offer evidence of his good character for a trait involved in the particular prosecution; evidence of defendant's general reputation for violence or nonviolence is relevant in a murder prosecution, it stated, and the semantic distinction relied on by the prosecution was not of any import.

Responding to the prosecution's second contention, the court stated:

> It is true that the admissibility of character evidence is grounded upon the premise of improbability of guilt by such a person, but a concession of the physical act which occurred is not synonymous with a concession of guilt. A specific intent is an indispensable element of the murder, and character evidence may tend to negate the existence of the mens rea.

While there was evidence in the record of defendant's reputation for honesty and his lack of prior criminal involvement, the court declined to find the error harmless since there was no other evidence of his reputation for peacefulness. Barlow v. Commonwealth, 297 S.E.2d 645 (1982), 19 CLB 384.

§ 13.50. Proof of other crimes

Nevada Defendants, convicted of armed robbery, argued on appeal that evidence of criminal activity unrelated to the crime charged was erroneously admitted through the testimony of a police detective and required reversal.

At trial, the detective testified that witnesses identified defendants from photographs that he had obtained from the homicide division. The defense counsel objected to the reference to the homicide division, but rejected the trial court's offer to give a limiting instruction because they felt that such an admonishment would highlight the detective's statement.

The Nevada Supreme Court noted the general rule that evidence of prior criminal activity is admissible only for limited purposes and only if its probative value outweighs its prejudicial effect, and affirmed the convictions.

The rule against introduction of previous offense testimony is not violated, said the court, unless the testimony is prejudicial to the defendant. Here, it found, the reference to the homicide division was too tenuous to have damaged the defendants. Coats v. State, 643 P.2d 1225 (1982), 19 CLB 88.

§ 13.70. Circumstantial evidence

Florida Defendant was convicted of a double murder based upon evidence that his fingerprints were found on various objects in the victims' home; the fingerprint evidence, he argued, was insufficient to sustain the conviction. At trial, he had testified that he handled the items on the day before the killings when he and the victims' nephew, a friend, had performed some household chores.

Held, reversed and remanded. The Florida Supreme Court noted that the case against defendant was entirely circumstantial and thus subject to a "special standard of review." It stated:

> Where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence.

Here, said the court, the fingerprint evidence was the only proof of defendant's involvement in the murders and the state "failed to establish that [defendant's] fingerprints could only have been placed on the items at the time the murder was committed." Moreover, it found, defendant's explanation was reasonable and not inconsistent with the state's proof. Jaramillo v. State, 417 So. 2d 257 (1982), 19 CLB 178.

§ 13.110. Stipulations as evidence

Missouri Defendant, convicted of murder for setting a fire which took five lives, argued on appeal that the trial court erred in allowing photographs of the burned victims into evidence.

Admission of the photos was unnecessary to resolve any disputed issue in the case and served only to inflame the jury, defendant contended, because he had offered to stipulate to the cause of death.

Held, conviction affirmed. The Missouri Supreme Court noted that the state was not obligated to accept defendant's offer to stipulate. As the state must bear the burden of proving a defendant's guilt beyond a reasonable doubt,

continued the court, "it should not be unduly limited as to the manner of satisfying this quantum of proof." State v. Clemons, 643 S.W.2d 803 (1983), 19 CLB 488.

§ 13.115. Identification evidence

§ 13.140. —Lie detector test

Maine Defendant had been released on parole in 1976, following his 1966 murder conviction. He was arrested on rape charges in 1980 and a parole revocation hearing ensued.

At the hearing, the complainant herself testified and the results of a polygraph test given to her were received in evidence. Defendant's parole was revoked following the hearing, upon a finding by the parole board that defendant had committed the rape and thereby violated the conditions of his release. Defendant petitioned for post-conviction review, contending that his state and federal due process rights had been violated by use of the polygraph evidence at the hearing.

Held, reversed and remanded. The Supreme Judicial Court of Maine vacated the parole revocation. Under Morissey v. Brewer, 408 U.S. 471, 92 S. Ct. 2593 (1972), it observed, a state may not revoke an individual's probation or parole without affording the individual due process of law. State law, it continued, barred the use of polygraph evidence from criminal proceedings; while recognizing that a parole revocation hearing is not a criminal trial, it concluded:

> [T]his highly unreliable [polygraph] evidence tended to strongly buttress the credibility of the witness. Accordingly, we conclude that the use of this evidence rendered the parole revocation hearing fundamentally unfair and denied the defendant due process of the law.

Ingerson v. State, 448 A.2d 879 (1982), 19 CLB 177.

§ 13.158. Recantation of previous testimony by witness

Arkansas Defendant, convicted of rape, argued on appeal that it was error to permit a prosecution witness to testify in rebuttal that he had given perjured testimony for defendant at an earlier trial of the same case.

The defendant had asserted an alibi defense. His parents testified that on the night in question he had arrived home at 2:00 A.M., two hours before the rape was committed, and remained at home until noon on the following day; they understood that he had been out with a friend, Dean. Dean had testified at the earlier trial, which ended in a mistrial, that he and the defendant had been out all evening and that he had driven the defendant home at some time after midnight.

However, at the second trial, Dean was called by the prosecutor in rebuttal. He acknowledged that his earlier testimony was false and stated that the defendant had asked him to give the fabricated testimony.

Held, affirmed. The Arkansas Supreme Court stated that fabricated evidence of innocence has traditionally been considered cogent evidence of guilt. A party's attempt to fabricate evidence, said the court, is proof that the party himself believes his case to be weak; from that, it reasoned, the inference can be drawn that the case lacks truth and merit.

Citing *Wigmore*, the court stated that the inferences to be drawn from fabricated evidence did not apply to any specific fact in the case, but against the entirety of the offering party's evidence. Thus, it suggested, Dean's testimony was admissible not only in rebuttal, but also as part of the state's case in chief. Kellensworth v. State, 633 S.W.2d 21 (1982), 19 CLB 82.

§ 13.190. Immunity of witness from prosecution

Georgia Defendant and two others, Batton and Dickey, were charged with murder and robbery; the charges against Batton were dismissed, but both defendant and Dickey were convicted at separate trials. Defendant was sentenced to death; he then moved for a new trial and a grant of immunity for Batton, claiming that if immunized, Batton would testify that Dickey, not defendant, had actually fired the fatal shots.

Defendant's motions were denied and he appealed, claiming a violation of his Sixth Amendment right to obtain witnesses in his favor.

Held, affirmed. The Georgia Supreme Court observed that while the Sixth Amendment gave a criminal defendant the right to obtain the testimony of favorable witnesses, it did not confer a right to displace a witness's properly claimed privilege against self-incrimination.

However, the court suggested that due process considerations could justify a judicial

grant of use immunity to a defense witness, even absent a statutory basis for judicially conferred immunity, where the witness can offer exculpatory testimony essential to the defense and there is no countervailing state interest in withholding use immunity.

Assuming, without deciding, that the Georgia courts have the inherent power to grant use immunity under such conditions, the court here found that defendant's request for immunity for Batton was not warranted. The prosecution, it stated, had expressed an interest in prosecuting Batton if sufficient evidence of her involvement in the crime was discovered; a grant of use immunity could jeopardize that prosecution by imposing on the state the burden of proving that the evidence against Batton was derived independently of her testimony on defendant's behalf. The state's interest in a future prosecution of Batton, decided the court, outweighed defendant's need for her testimony.

Accordingly, the Georgia high court held that defendant's motions for a grant of immunity to Batton and a new trial had been properly denied. Dampier v. State, 290 S.E.2d 431 (1982), 19 CLB 86.

§ 13.200. Hostile witnesses

North Carolina Defendant, convicted of trafficking in methaqualone and related charges, argued on appeal that she was entitled to a reversal because the court improperly refused to declare a defense witness hostile.

The witness, Watson, had informed defense counsel that he would testify that another person, not defendant, delivered the drugs that were ultimately sold to an undercover investigator. When called to the witness stand, however, Watson failed to testify as expected. Defense counsel, claiming surprise, requested a voir dire examination out of the jury's presence to establish that Watson should be declared a hostile witness. The trial judge refused to grant the motion and, accordingly, counsel was not permitted to cross-examine or ask leading questions of his own witness.

Held, denial of the motion was prejudicial error; new trial ordered. The North Carolina Supreme Court said that counsel should be able to lead his own witness where the witness is hostile or unwilling to testify. Had the trial judge allowed the requested voir dire examination, "defense counsel might have been able to demonstrate that to his surprise the witness was unwilling to answer certain questions before the jury which were very relevant to defendant's defense." Since the testimony defendant sought to elicit from Watson went to the heart of the defense, the North Carolina high court found that the trial judge's ruling constituted reversible error. State v. Tate, 297 S.E.2d 581 (1982), 19 CLB 381.

§ 13.207. Informants—disclosure of identity

Mississippi Defendant, convicted of selling a controlled substance to an undercover investigator, argued on appeal that he was entitled to a reversal because, inter alia, the trial court did not require the state to identify a confidential informant.

At trial, the state's evidence showed that the informant introduced defendant and the investigator, and was present when the drug sale occurred; defendant testified that the informant actually sold the drugs to the investigator and then, in the investigator's presence, gave defendant the monetary proceeds in repayment of a loan.

Held, reversed and defendant discharged. The Mississippi Supreme Court distinguished an informant who simply tells the authorities about criminal activity from the informant in this case, who took part in the police activities, becoming a witness to the crime.

The identity of an informant need not be disclosed if he was used only as an informant, said the court. Here, however, where the informant played an active role in the purchase of the contraband and could have been called as a witness, defendant was entitled to know his identity. Daniels v. State, 422 So. 2d 289 (1982), 19 CLB 385.

§ 13.225. Requirement of corroboration —accomplice testimony

Maryland Defendant, convicted of murder, argued on appeal that he was entitled to a reversal because of the prosecution's failure to corroborate accomplice testimony connecting him to the crime. At trial, Morris, an admitted accomplice, testified that while he, defendant, and another were committing a robbery, defendant fatally shot the victim; Morris then went to the home of friends and told them what had occurred. Morris's friends also testified, over defendant's objection, as to Morris's statements to them concerning the crime.

There was no other evidence linking defendant to the incident.

Held, reversed and remanded. The Maryland Court of Appeals ruled that an accomplice cannot be corroborated by "the extrajudicial comments of the accomplice himself."

Morris's statements were closely connected in the time and causally related to the crime, stated the court, and thus could be admitted as res gestae exceptions to the hearsay rule; however, irrespective of their admissibility as "excited utterances," using the statements to corroborate Morris's testimony eviscerated the requirement of accomplice corroboration. The court explained:

> We believe the conclusion is logical that commensurate with the requirement that an accomplice's testimony must be corroborated is the requirement that the evidence offered as corroboration must be independent of the accomplice's testimony. Clearly, repeating what an accomplice stated out of court cannot mount this hurdle.

Therefore, concluded the court, the evidence against defendant was insufficient as a matter of law. Turner v. State, 452 A.2d 416 (1982), 19 CLB 392.

§ 13.230. Cross-examination—right to use witness's prior statements

§ 13.245. —Impeachment by prior conviction

Iowa Defendant, convicted of murder, argued on appeal that it was error for the prosecutor to cross-examine him at trial about his previous conviction for escape. Escape, he contended, is not a crime of dishonesty or falsity and hence had no bearing on his credibility as a witness.

Held, conviction reversed and remanded for a new trial. The Iowa Supreme Court stated that evidence of a prior conviction must meet a two-pronged test: (1) the prior crime must involve dishonesty or false statement and (2) the trial court must determine that the danger of unfair prejudice does not substantially outweigh the probative value of the conviction." As the crime of escape does not contain an element of dishonesty or falsity, the court stated, it was improper to allow defendant's conviction for that crime to be used as the basis for impeachment. State v. Gavin, 328 N.W.2d 501 (1982), 19 CLB 484.

§ 13.255. —Impeachment by prior inconsistent statement

Kentucky Defendant, convicted of rape, argued on appeal that the trial court committed reversible error when it permitted the prosecutor to introduce defendant's tape-recorded confession as rebuttal evidence.

The recording was proffered after the defense had rested, to show that defendant had made statements to an interrogating police officer which contradicted his trial testimony. Defendant objected, asserting that the recording properly should have been introduced during the prosecution's case in chief; his objection was overruled and the recording was played for the jury.

Held, reversed. The Kentucky Supreme Court acknowledged that the recording indeed impeached defendant's credibility since it contained prior contradictory statements. The court found that "these statements go beyond simply negating his credibility; they go to the very substance of the matter by directly showing [defendant's] culpability."

Any statements or act (e.g., flight) in the nature of an admission of guilt should be introduced as evidence in chief and *"should not be introduced in rebuttal* under the guise of contradicting or impeaching defendant as a witness" (emphasis in original).

Even though the trial judge instructed the jury in this case that the only purpose of the rebuttal evidence was to contradict defendant, the Kentucky high court found that the recording was so prejudicial that the admonition could not cure its effect and ordered a new trial. Gilbert v. Commonwealth, 633 S.W.2d 69 (1982), 19 CLB 84.

Tennessee Defendant, convicted of armed robbery, argued on appeal that there should be a reversal because the trial court failed to instruct the jury that the state's impeachment of two of its own witnesses could be considered only on the issue of their credibility.

Defendant had asserted an alibi defense, introducing testimony that he was with his wife and friends when the robbery occurred. At the close of the defendant's proof, the state called two of his children to rebut the alibi, but their trial testimony was consistent with the alibi. The prosecutor proceeded to question the children as to contradictory statements they had given to a police officer previously and then called the officer to prove the prior inconsistent statements.

Defense counsel did not object to the officer's testimony and did not request an instruction advising the jury that the witnesses' prior inconsistent statements were received only for impeachment purposes and not as substantive evidence of the facts stated.

Held, reversed and remanded. The Tennessee Supreme Court stated that the facts presented an exceptional situation. The principle is well established, said the court, that prior inconsistent statements offered to impeach a witness are admissible only on the issue of credibility. In general, though, a trial judge's failure to give such a limiting instruction is not reversible error in the absence of a request from defense counsel.

Here, however, the court characterized the state's case as weak and the impeachment testimony extremely damaging in the context of the facts. It was unable to say "beyond a reasonable doubt that the failure to instruct the jury on the limited purpose for which the children's prior inconsistent statements could be considered did not result in substantial prejudice to appellant which affected the results of the trial."

Accordingly, the court found that failure to give the limiting instruction resulted in substantial prejudice to defendant's rights and reversed. State v. Reece, 637 S.W.2d 858 (1982), 19 CLB 270.

§ 13.280. —Impeachment on collateral issue

Michigan Defendant was charged with murder and conspiracy to murder in connection with the killing of his wife. At trial, he testified in his own behalf and was cross-examined about an argument that he and his wife had engaged in approximately one week before her body was discovered. Defendant denied the argument. In rebuttal, the prosecutor called a witness who testified that she had overheard the argument in question.

Defendant was acquitted of murder but convicted of the conspiracy charge. On appeal, he asserted that the rebuttal testimony was improper impeachment on a collateral matter. The state argued that the rebuttal testimony was admissible both on the issue of motive and for impeachment purposes.

Held, reversed and remanded for a new trial. The Michigan Supreme Court noted that the testimony of the rebuttal witness may, indeed, have tended to establish motive but, if so, should have been introduced during the prosecution's case in chief; it is improper, said the court, for the state to divide its direct proof and reserve some for rebuttal.

Furthermore, it ruled, while the rebuttal evidence did contradict defendant's testimony on cross-examination, cross-examination may not be used "to revive the right to introduce evidence."

Even if the witness's testimony was not admissible as part of the state's direct case, its use in rebuttal to contradict defendant violated the principle that extrinsic evidence may not be used to impeach a witness on collateral matters. Refusing to find the error harmless, the court reversed and ordered a new trial. People v. Losey, 320 N.W.2d 49 (1982), 19 CLB 173.

§ 13.315. Hearsay evidence

North Carolina Defendant was convicted of the robbery of a jewelry store; an alleged accomplice, Hart, was not apprehended. At trial, a prosecution witness testified that she had met with defendant and Hart following the robbery; during the ensuing conversation, both made incriminating statements concerning the crime. Over defendant's objection, the witness was permitted to testify to the substance of Hart's statement, which inculpated defendant. On appeal, defendant argued that Hart's statement was inadmissible hearsay and should have been excluded.

Held, conviction affirmed. The North Carolina Supreme Court ruled that Hart's "hearsay statement [was] admissible because of the implication derived from the defendant's silence or failure to deny the statements." A statement is admissible as an "implied admission," explained the court, if made in the defendant's presence "under such circumstances that a denial of an untrue statement would be naturally expected and . . . that [the defendant] was in a position to hear and understand the statement and that he had the opportunity to speak." Here, found the court, Hart's statement clearly met the criteria of an implied admission and was properly received in evidence. State v. Cabey, 299 S.E.2d 194 (1983), 19 CLB 488.

§ 13.325. —Use of prior testimony

Nebraska Defendant, convicted of robbery, argued on appeal that the trial court erred in admitting the preliminary hearing testimony of an absent prosecution witness. A week before

trial, the prosecution learned that the witness had moved out of state. Attempts to contact her by telephone and through local law-enforcement agencies were unsuccessful. The witness had testified at the preliminary hearing, at which time defense counsel cross-examined her without restriction. Her hearing testimony, which essentially corroborated the testimony of other witnesses who did testify at trial, was admitted over defendant's objection. On appeal, defendant contended that the state failed to make sufficient efforts to locate the missing witness.

Held, affirmed. The Nebraska Supreme Court stated that when a witness cannot be located, despite the prosecution's diligent efforts, testimony given by the witness at a previous trial or hearing for the same offense may be introduced at trial.

Here, the court found sufficient evidence that the witness was not available and that reasonable efforts were made to locate her. As defendant was present at the hearing and the witness was subject to full cross-examination, admission of her prior testimony was proper. State v. Williams, 320 N.W.2d 105 (1982), 19 CLB 180.

§ 13.330. —Dying declaration

New Mexico Defendant, convicted of voluntary manslaughter, argued on appeal that the deceased's deathbed statement was erroneously admitted into evidence as a dying declaration. The deceased had not been informed that he would die of his gunshot wounds. However, he acknowledged to the family attorney, who was visiting for the purpose of obtaining a dying declaration, that his injuries were very serious and that there was a strong possibility that he would not recover. He then answered the attorney's question concerning the shooting incident.

The attorney testified that during the interview, the deceased was in obvious pain, had difficulty breathing, and was being monitored by machines; several hours after the interview, he died.

Held, trial court's verdict and conviction affirmed. The New Mexico Supreme Court held that to be admissible as a dying declaration, it must be established that a statement was made under a sense of impending death. It is not required that the declarant express a belief that he is dying; rather, "if it can reasonably be inferred from the state of the wound or the state of the illness that the dying person was aware of his danger, then the requirement of impending death is met."

Here, said the court, the declarant's recognition of the seriousness of his injuries and the strong possibility of death, combined with his actual condition, was sufficient to show that he believed his death to be imminent. Accordingly, it concluded, his statement qualified as a dying declaration. State v. Quintana, 644 P.2d 531 (1982), 19 CLB 81.

§ 13.335. —Guilty pleas of co-defendant

Kentucky Defendant and Hodge, an alleged accomplice, were charged with armed robbery. On the first day of their joint trial, Hodge pled guilty to a reduced charge; subsequently, he was called as a prosecution witness to testify against defendant. During direct examination, the prosecution questioned Hodge extensively about his plea of guilty and his knowledge of the potential sentence; defendant contended, on appeal following his conviction, that the case against him was impermissibly bolstered by Hodge's repeated admissions of guilt.

Held, reversed. The Kentucky Supreme Court noted that it is improper for the prosecution to show at trial that a co-defendant has already been convicted of the same charges. It continued that:

> [T]o make such a reference and to blatantly use the conviction as substantive evidence of guilt of the indictee now on trial is improper regardless of whether the guilt has been established by plea or verdict, whether the indictee does or does not testify, and whether or not his testimony implicates the defendant on trial.

While evidence of Hodge's guilty plea would have been admissible to impeach his testimony on cross-examination by defendant, said the court, the prosecutor's use of the guilty plea was prejudicial and warranted a new trial. Tipton v. Commonwealth, 640 S.W.2d 818 (1982), 19 CLB 381.

§ 13.341. —Prior consistent statements as substantive evidence

Connecticut Defendant, convicted of sexual assault, argued on appeal that the trial court erred in permitting the victim to testify about her statements to police concerning the crime. Over defendant's objection, the victim testified:

(1) that she told a police officer on May 26, 1979, that she had been raped and gave him a description of the man who had raped her; (2) that at the time she also gave the police a description of the van in which the rape occurred; (3) that on June 2, 1979, when she was walking with her aunt on Congress Avenue she saw what she identified as the same van in which she was raped; (4) that she remained in the area and alerted a police officer, who was ticketing cars in the area, that she believed the parked van to be the van in which she had been raped; and (5) that when the defendant thereafter walked out onto the street she identified him to the police officer as the man who raped her.

Defendant asserted that the above portion of the victim's testimony was inadmissible hearsay.

Held, conviction affirmed. The Connecticut Supreme Court ruled that in sex-related cases, prior consistent statements of the victim are admissible as exceptions to the hearsay rule as corroborating evidence showing "constancy of accusation."

It is permissible, said the court, for the victim to recount details of prior statements, provided, as here, the witness testifies about the incident itself and also identifies the person to whom the prior statements were made. Accordingly, the court found defendant's contentions to be without merit. State v. Hamer, 452 A.2d 313 (1982), 19 CLB 391.

§ 13.375. —Res gestae and spontaneous declarations

Indiana Defendant, convicted of rape, argued on appeal that there should be a reversal because evidence that he had killed his mother previously was introduced at his trial.

The complainant testified that defendant told her, during the rape, that he had been in prison for killing his mother. The state then established that defendant had, in fact, committed that crime. It established the fact through the testimony of the arresting officer and defendant's ex-wife, and on cross-examination of defendant himself.

Held, affirmed. The Indiana Supreme Court rejected defendant's claim that admission of testimony regarding the previous killing was unduly prejudicial, holding that "statements uttered by the accused during the commission of the offense charged, including prejudicial comments about his prior prison record, are admissible as part of the *res gestae* of the offense."

Moreover, it continued, the evidence was admissible on the issue of identity. As complainant's attacker told her that he had killed his mother, the fact that defendant had, indeed, committed such a crime was circumstantial evidence that defendant committed the rape. Therefore, admission of the disputed testimony was proper. Taylor v. State, 438 N.E.2d 294 (1982), 19 CLB 176.

WEIGHT AND SUFFICIENCY

§ 13.380. Sufficiency of evidence

§ 13.385. —Drug violations

Mississippi Defendant, convicted of possession of marijuana with intent to deliver, argued on appeal that there should be a reversal because the evidence was insufficient, as a matter of law, to sustain the conviction.

At trial, it was established that defendant and a friend, Pace, left Virginia for Mississippi in Pace's auto. Pace's ostensible purpose was to visit his family, while defendant was to be dropped off at another friend's house along the return route. After getting under way, Pace disclosed that he had approximately fifty pounds of marijuana in the trunk of the car. Subsequently, the two stopped at a motel and Pace brought the marijuana, in large garbage bags, into their room.

The following day, police, armed with a search warrant, entered the room and seized the marijuana and various items of drug paraphernalia which were in plain view. Pace, who pleaded guilty prior to trial, was called as a witness by defendant and testified that the marijuana was his and defendant had "nothing to do with it."

Held, affirmed. The Mississippi Supreme Court found that the issue of his guilt had properly been submitted for jury's determination. The concept of possession, it stated, is not susceptible to a specific rule but the facts must be sufficient to warrant a finding that a defendant was "aware of the presence and character of the particular substance and was intentionally and consciously in possession of it." Constructive possession, continued the court, "may be shown by establishing that the drug involved was subject to [defendant's] dominion or control." Here, the jury's verdict was not against the overwhelming weight of the evidence; consequently, the court affirmed the conviction.

Martin v. State, 413 So. 2d 730 (1982), 19 CLB 80.

§ 13.410. —Receiving stolen goods

Ohio Defendants, husband and wife, were convicted of possessing stolen stereo equipment seized from their son's bedroom in the family residence pursuant to a search warrant. They contended on appeal that the evidence was insufficient to establish that they had actual knowledge that stolen property was located in their home.

Their son had a lengthy juvenile record for theft-related offenses, a situation well-known to defendants. Both defendants testified at trial that they were unaware that the equipment, which was connected and operable, was in the house prior to the seizure.

It was not disputed that defendants owned the residence and had dominion and control over the entire premises as well as having parental custody, control, and responsibility over their son.

Held, affirmed. The Ohio Supreme Court found that the mere fact that the stolen property was located within the family residence and subject to defendants' control, did not amount to proof of constructive possession. However, it found, the speakers were bulky, operable, and in plain view; these circumstances, together with defendants' awareness of their son's criminal history, were sufficient to sustain a finding that defendants had actual knowledge that the stolen equipment was on the premises. Thus, concluded the court, defendants had constructive possession of the stolen property. State v. Hankerson, 434 N.E.2d 1362 (1982), 19 CLB 83.

14. TRIAL

§ 14.10. Qualifications of trial judge

§ 14.15. —Disqualification of trial judge

Michigan Defendant was convicted, after a bench trial, of breaking and entering. Initially, he had appeared before the trial court to enter a guilty plea to the crime; he admitted a factual basis for the crime but, midway through the allocution, changed his mind and was permitted to withdraw the guilty plea.

Defendant then waived a jury and proceeded to trial before the same judge who presided over the abortive plea proceeding.

On appeal, defendant argued that his right to be tried by an impartial factfinder had been violated; the trial judge, he contended, should have disqualified himself or advised defendant that he had a right to a trial by another judge. The intermediate appellate court agreed and reversed the conviction.

Held, reversed and remanded. The Michigan Supreme Court acknowledged that a judge's knowledge of the facts (e.g., by reading transcripts of prior proceedings) could serve as a basis for disqualification; here, however, defendant was completely aware of the trial judge's involvement in the plea proceeding but nevertheless waived a jury trial. Moreover, the court noted that there was no evidence of actual bias against defendant.

Under the circumstances, said the court, the trial judge was under no obligation to, *sua sponte*, afford defendant the opportunity to be tried by another judge and, having not complained below, defendant could not raise the issue for the first time on appeal. People v. Cocuzza, 318 N.W.2d 465 (1982), 19 CLB 83.

§ 14.30. Defendant's right to continuance

Indiana Defendant, convicted of robbery, argued on appeal that there should be a reversal because the trial court denied his motion for a continuance predicated upon failure of a defense witness to appear. Defense counsel requested the postponement orally on the morning the trial was scheduled to commence, stating that the witness was essential to defendant's case and that she had agreed to appear. Noting that trial had been continued on a previous occasion because the same witness had failed to appear, the court ordered that the matter proceed.

Held, conviction affirmed. The Indiana Supreme Court rejected defendant's argument that denial of his motion amounted to a violation of his constitutional "right to have compulsory process for obtaining witnesses." Defendant, it found, had notice of the trial date and an opportunity to obtain the issuance of subpoenas and, if necessary, court enforcement of same; however, he failed to avail himself of that opportunity and thus had no recognizable ground on which to base a complaint.

Refusal to grant the motion was not an abuse of discretion, continued the court, "given the trial court's granting of a previous motion for continuance because of the absence of this same witness, the lack of an explanation at the time the motion was made supporting the essential nature of the witness's testimony to the

defendant's contentions . . . and the failure to employ the subpoena power." Rowe v. State, 444 N.E.2d 303 (1983), 19 CLB 482.

§ 14.35. Right to public trial

New York Defendant was charged with criminal sale of a controlled substance and released on bail pending trial. On July 5, defense counsel was notified that the case was scheduled for trial on July 8. He immediately advised defendant, who claimed illness and expressed uncertainty about her ability to appear. In fact, defendant failed to appear on July 8 and the case was put over until the following Monday, July 11.

When defendant did not appear on the adjourned date and defense counsel revealed that he had been unable to locate her over the weekend, the court ordered a hearing to determine her whereabouts. At the hearing, a friend who had posted bail for defendant testified that, shortly before the trial was scheduled, defendant mentioned that she intended to leave town. The friend also had heard that defendant was then "out in the street."

The court found that defendant's absence was voluntary and that she had waived her right to be present at trial. Over defense counsel's objection, defendant was tried in absentia and convicted by the jury; while defense counsel called no witnesses, he did state that he would have called defendant had she been present and that she would have given an exculpatory explanation for the alleged drug sales.

On appeal, defendant contended that her right to be present at trial under the federal and state Constitutions had been violated by her trial in absentia.

Held, conviction reversed. The New York Court of Appeals stated that while a defendant's right to be present at trial may be waived, the trial judge's "factual finding of voluntary absence from court on the day scheduled for her appearance is alone insufficient as a matter of law to establish an implicit waiver of defendant's right to be present at trial so as to permit the court to try defendant *in absentia*."

The right to be present at trial, it continued, is of a fundamental constitutional nature and accordingly, the issue is whether defendant knowingly, voluntarily, and intelligently waived a known right. The court refused to find such a waiver here because defendant had not been informed of the nature of her right to be present and the consequences of her failure to appear (i.e., that a trial in absentia could proceed). Thus, it concluded that a finding that a criminal defendant had received actual notice of a trial date and has nevertheless voluntarily failed to appear is insufficient, as a matter of law, to justify a trial in absentia.

Even where a defendant is advised fully of his right to be present and fails to appear, cautioned the court, a trial in absentia should not be automatic. Rather, the trial judge should consider "all appropriate factors, including the possibility that defendant could be located within a reasonable period of time, the difficulty of rescheduling trial and the chance that evidence will be lost or witnesses will disappear." In most cases, it stated, an adjournment pending execution of a bench warrant would be preferable to trial in absentia, unless it can be shown by the prosecution "that such a course of action would be totally futile." People v. Parker, 440 N.E.2d 1313 (1982), 19 CLB 271.

§ 14.150. Conduct of prosecutor

Alabama Defendant, convicted of murder and robbery, argued on appeal that there should be a reversal because the district attorney trying the case was permitted to act as both prosecutor and witness. The district attorney testified as a witness to an oral confession and written statement made by defendant after his arrest, becoming the principal state's witness. Over defendant's objection that the district attorney should not occupy a dual role, the trial court permitted him to continue as prosecutor.

Held, conviction reversed and new trial ordered. The Alabama Court of Criminal Appeals stated that generally, where a lawyer is a witness for his client, the trial of the case should be left to other counsel. Unless made necessary by "sound and compelling" circumstances, continued the court, the prosecuting attorney should not testify at the trial.

Here, it was evident that prior to trial, the prosecutor was aware that he would be a witness; since nothing in the record suggested that he was the only witness to defendant's confession or the only one who could prosecute the case, his actions could not be justified. Waldrop v. State, 424 So. 2d 1345 (Crim. App. 1982), 19 CLB 484.

§ 14.155. —Improper questioning of witnesses

Montana Defendant, convicted of theft, argued on appeal that there should be a reversal

because the prosecutor improperly cross-examined a defense witness about defendant's criminal history.

The witness had testified that defendant had a good reputation for honesty and related character traits. On cross-examination, she was asked if she knew that defendant had prior arrests for traffic and intoxicated driving offenses; she denied knowledge of defendant's prior record.

Held, reversed; new trial ordered. The Montana Supreme Court noted that it was improper for the prosecutor to cross-examine the character witness based upon an arrest record, which has no substance of itself to establish character and, in any event, involved offenses that did not relate to the traits in issue at trial. Refusing to find the error harmless, the court stated that "imputing to him by indirection a criminal record, and one related to traits of character not involved in the specific offense for which the defendant was charged here, was certainly substantial." State v. Kramp, 651 P.2d 614 (1982), 19 CLB 381.

§ 14.195. —Defense counsel's "opening the door"

New York Defendant, convicted of murder, argued on appeal that the trial court erred in permitting the prosecutor, on redirect examination of the investigating detective, to elicit hearsay testimony inculpating defendant.

The most damaging testimony against defendant was given by Marrero. The investigating detective was asked, during cross-examination by defense counsel, whether Marrero himself had been considered a suspect; the detective answered affirmatively. On redirect, the prosecutor asked the detective for the basis upon which he had considered Marrero a suspect. Defendant's hearsay objection was overruled, with the trial court holding that defense counsel had "opened the door" by raising the question on cross-examination. The detective proceeded to recount a statement given to him by "a concerned citizen informant" which described defendant and Marrero as the perpetrators; the detective went on to reveal other information regarding defendant and Marrero gathered during the investigation which enabled him to rule out Marrero as a suspect.

Held, order reversed. The New York Court of Appeals recognized that the "opening the door" theory gives a party the right to explain and clarify on redirect examination issues that have been raised for the first time on cross-examination by the opposing party. However, it noted, the trial court should only allow the introduction of so much additional evidence on redirect as is necessary to meet what has been brought out on cross-examination; the theory does not provide an independent basis for introducing new evidence on redirect.

Here, defense counsel's cross-examination gave the prosecutor an opportunity to explore the basis for the detective's suspicions, but did not

> clear the way for the prosecutor to explore the entire ambit of the officer's investigation, including all information connecting the defendant with the homicide. In short, although defense counsel may have partially "opened the door" by asking whether [Marrero] was a suspect, the passageway thus created was not so wide as to admit the hearsay testimony directly implicating the defendant in the crime charged. The door was opened only as to whether the witness considered Marrero a suspect.

It was error, ruled the court, to broaden the scope of redirect inquiry to include all information concerning defendant, including hearsay, developed during the detective's investigation. Since the other evidence of defendant's guilt was not overwhelming, the error was not harmless, said the court in ordering a new trial. People v. Melendez, 434 N.E.2d 1324 (1982), 19 CLB 78.

15. JURY

SELECTION

§ 15.25. Conduct of voir dire

New Hampshire Defendant, charged with murder, escaped from custody during jury selection. The trial proceeded in defendant's absence, with the court questioning the five jurors already selected, as well as the prospective jurors, about their ability to render a fair and impartial verdict despite defendant's escape. The members of the jury, as finally constituted, had all responded that defendant's escape and absence from the trial would not influence their judgment as to his guilt or innocence.

Defendant was convicted and subsequently apprehended; on appeal, he argued that the trial court's voir dire of the jury was insufficient to ensure their impartiality.

Held, affirmed. The New Hampshire Supreme Court ruled that the record did not establish an abuse of the trial court's discretion during voir dire and was sufficient to ensure the empaneling of a fair and impartial jury.

While the prospective jurors may have known about defendant's escape, said the court, each of those finally selected stated under oath that his or her verdict would be based only upon the evidence at trial. Moreover, several prospective jurors were excluded when they stated that they had formed opinions about defendant's guilt because of his escape, thus establishing that the trial court's questioning was sufficient to uncover bias or prejudice. State v. Lister, 448 A.2d 395 (1982), 19 CLB 179.

Rhode Island Defendant, convicted of conspiracy to commit robbery, argued on appeal that there should be a reversal because the trial court erroneously refused to disqualify two jurors for cause.

Defendant had challenged both jurors, claiming that they equivocated when questioned about their ability to act impartially; the trial court refused to excuse either for cause and both were peremptorily challenged by defendant. Defendant contended that requiring him to exercise two of his six peremptory challenges to remove these prospective jurors from the panel impermissibly diluted and diminished his right to a fair trial.

Held, affirmed. The Rhode Island Supreme Court assumed without deciding that the two jurors should have been excused for cause. But the court concluded that this fact alone "[did] not so impair the right of peremptory challenge as to constitute reversible error." It held that the "minimal requirement to the assertion of prejudicial error in such a context would be that upon exhaustion of a defendant's peremptory challenges, he should bring to the attention of the trial justice that he is unsatisfied with the makeup of the jury assembled to try the case."

As defendant had not expressed his dissatisfaction with the jury, as finally selected, to the trial court, his argument was rejected. State v. Barnville, 445 A.2d 298 (1982), 19 CLB 85.

Tennessee Defendant, convicted of robbery, argued on appeal that reversible error was committed when the prosecutor was allowed to state, during voir dire, that a city court judge and the grand jury both had already found probable cause to believe that defendant had committed the crime charged. The remarks were made in the context of an explanation, to prospective jurors, of the criminal justice process.

Held, reversed and remanded for a new trial. The Tennessee Supreme Court characterized the prosecutor's statements as "highly improper." The jury was misled, said the court, because it was not informed that grand jury proceedings are ex parte and preliminary hearings often "cursory" in nature. The effect of the prosecutor's remarks, it found, was to create bias in the minds of the jurors and deprive defendant of the presumption of innocence. Refusing to find the error harmless, the Tennessee high court ordered a new trial. State v. Onidas, 635 S.W.2d 516 (1982), 19 CLB 181.

§ 15.45. Exposure of jurors to prejudicial publicity

Minnesota Defendant was charged with several counts of criminal sexual conduct and related crimes for allegedly engaging in sexual activities with children.

He moved for dismissal of the charges on the grounds of misconduct by an investigating officer, who had tipped off television news reporters that defendant's residence was to be searched on a particular night. The searches were filmed by a news crew and the resulting publicity, defendant contended, prejudiced his right to a fair trial; as an alternative to dismissal, he also argued for suppression of the evidence seized during the search. His motions were denied but the trial judge granted a change of venue; defendant took an interlocutory appeal.

Held, remanded for trial. The Minnesota Supreme Court ruled that, notwithstanding the deliberate leak of information concerning the investigation by agents of the state, defendant was not entitled to dismissal or suppression. Neither was an appropriate remedy, the court stated, because defendant's rights could be protected amply by the less dramatic measure ordered by the trial judge, i.e., a change of venue, together with an appropriate voir dire.

While the court noted that an accused's failure to demonstrate prejudice would not be dispositive under all circumstances, it refused to grant defendant the relief sought in this case and remanded for trial. State v. Astleford, 323 N.W.2d 733 (1982), 19 CLB 274.

INSTRUCTIONS

§ 15.155. Lesser included offenses

Arkansas Defendant, convicted of aggravated robbery, argued on appeal that the trial judge erred by refusing to instruct the jury that it could find defendant guilty of the lesser included offense of simple robbery.

At trial, it was established that defendant displayed a gun and demanded money from a store owner. As the owner handed over the money, he activated a hidden camera that photographed the scene; the photograph showed defendant holding a small revolver.

Held, conviction affirmed. The Arkansas Supreme Court stated that while robbery is a lesser included offense of aggravated robbery, there is no need to instruct the jury as to the lesser offense "if there is no rational basis for acquitting [a defendant] of aggravated robbery and convicting [him] of the lesser offense."

Here, there was no rational basis for acquitting defendant of aggravated robbery and convicting him of simple robbery, because there was no question that a deadly weapon was used; defendant, the court stated, "was guilty of aggravated robbery or nothing at all." Therefore, it was not error to refuse to instruct on the lesser included offense. Lovelace v. State, 637 S.W.2d 549 (1982), 19 CLB 276.

DELIBERATION

§ 15.275. Other unauthorized or improper conduct

Colorado Defendant, convicted of assault, argued on appeal that there should be a reversal because of misconduct by a juror. The jurors had been permitted to return to their homes for the night when they had not reached a verdict after a day's deliberations. One juror consulted her dictionary at home for the definitions of "reasonable," "imaginary," and "vague," all terms used during the trial court's reasonable doubt instruction. During the following day's deliberations, she discussed the definitions with another juror and both decided that any doubts they harbored about defendant's guilt were "vague" and not "reasonable."

Held, conviction reversed and remanded for new trial. The Colorado Supreme Court stated that the jury is bound to accept the court's definition of legal concepts and "to obtain clarifications of any ambiguities in terminology from the trial judge, not from extraneous sources." This improper juror conduct required reversal, continued the court, because the record established that two jurors used the dictionary definitions in concluding that their doubts were not reasonable; their decisions to vote for conviction thus resulted from the misconduct. Accordingly, it held, the misconduct was sufficiently prejudicial to warrant reversal. Alvarez v. People, 653 P.2d 1127 (1982), 19 CLB 487.

16. POST-TRIAL MOTIONS

§ 16.00. Motion for new trial

§ 16.05. —Newly discovered evidence

Minnesota Defendant, convicted of arson and insurance fraud for burning his bar and grill, argued on appeal that he was entitled to a retrial based on newly discovered evidence.

A month after defendant's conviction, his attorney learned that another person, Schumann, had been bragging that he was responsible for the fire, which he had set to "get even" with defendant. Prior to the fire, defendant had told his daughter not to socialize with Schumann and it had been known that Schumann had access to the keys for defendant's business.

The trial court refused to grant a new trial, because Schumann, the source of the newly discovered evidence, had a poor reputation for truthfulness.

Held, reversed and remanded for new trial. The Minnesota Supreme Court found it probable that evidence of Schumann's incriminating statements would produce a different result at a second trial, particularly since the case against defendant was circumstantial. The court concluded:

> Here, the newly discovered evidence is not cumulative nor impeaching; rather, the evidence offers an alternative hypothesis inconsistent with defendant's guilt. The new evidence does not dispute the state's proof at the first trial that the fire was intentional but instead suggests that the fire was set by someone other than the defendant. Plainly, if believed, the new evidence probably would make a difference. At a new trial, the issue is not whether Randy Schumann is guilty of arson beyond a reasonable doubt but whether defendant is.

While acknowledging that the credibility of Schumann's statements was subject to ques-

tion, the court stated the "new evidence [was] not so doubtful as to make a different result improbable and . . . a jury should be the final arbiter." State v. Jacobson, 326 N.W.2d 663 (1982), 19 CLB 385.

New Mexico Defendant, convicted of homicide in the beating death of a fellow inmate at a state prison, argued on appeal that reversal was required because the state had failed to disclose the identity of an essential and exculpatory witness.

Following defendant's trial, a prison corrections officer revealed that defendant had left the area where the killing took place prior to its occurrence; the officer also disclosed that he had so informed prison officials during their investigation of the homicide. Neither the availability of the corrections officer nor the substance of his exculpatory statements had been given to the defense during pretrial discovery.

Held, motion for post-conviction relief denied. The New Mexico Supreme Court stated that there was no evidence in the record that the prosecutor knew of the witness's identity or statements, and found no deliberate or negligent nondisclosure which would warrant the granting of a new trial. The court "decline[d] to impute to the prosecutor as 'knowledge' every conversation, or every statement, made to a prison official regarding a prisoner who may be charged with commission of a crime." A defendant has an affirmative obligation to exercise due diligence in discovering exculpatory witnesses, said the court, continuing that "the defense may not be unduly relaxed in their search for evidence that is favorable and expect deficiencies to be remedied with a motion for a new trial."

Here, found the court, defendant had access to the prosecutor's files and, through his own investigation, could and should have discovered the corrections officer's identity prior to trial; if defendant's case was prejudiced, concluded the court, it was substantially attributable to his own inaction, not the result of misconduct by the prosecution. State v. Stephens, 653 P.2d 863 (1982), 19 CLB 486.

17. SENTENCING AND PUNISHMENT

SENTENCING

§ 17.35. Delay in sentencing

West Virginia Defendant, convicted of burglary upon his plea of guilt, argued on appeal that the delay of twenty-one months between entry of the plea and imposition of sentence violated his due process rights. Defendant had pled guilty in June 1977 and a pre-sentence report was submitted to the court in October of that year; the record disclosed no further proceedings until February 1979, one month before defendant was sentenced, when a supplemental presentence report was filed.

Held, remanded with directions. The Supreme Court of Appeals of West Virginia considered the record before it as incomplete and remanded the case to the trial court. While the passage of time alone, it noted, would not bar imposition of sentence, a "purposeful or oppressive delay" would constitute the violation of an accused's due process rights. As the record did not contain the reasons for defendant's delayed sentencing, the court found that it could not determine whether the delay was purposeful and oppressive, whether it was legitimate, or whether it was caused by a simple administrative oversight. Accordingly, the court ordered remand for entry of the reasons for the delay upon the record. Ball v. Whyte, 294 S.E.2d 270 (1982), 19 CLB 177.

§ 17.40. Standards for imposing sentence

Iowa Defendant, convicted of indecent exposure upon his plea of guilty, appealed from the sentence imposed on the ground that the sentencing judge improperly considered a burglary charge that had been dismissed as part of the plea bargain. Originally, defendant had been charged with burglary and indecent exposure for breaking into the complainant's residence, exposing himself, and making sexual remarks.

During the plea allocation, defendant admitted exposing himself but claimed that the complainant had permitted him to enter her home; after the plea was entered on the indecent exposure charge, the prosecutor dismissed the burglary count.

In imposing the maximum sentence, the judge stated that he could not ignore the factual basis for the charge, which included an illegal entry into a stranger's residence; the circumstances, he said, were of "such a severity that you need something to remind you that you do not enter people's houses without their permission."

Held, reversed in part and remanded for resentencing. The Iowa Supreme Court found that the burglary charge against defendant was no more than an unproven allegation that

should not have been considered and relied upon by the sentencing judge; "only facts that are admitted to or otherwise established as true" should be considered in determining sentence, it said.

Here, the sentencing judge erroneously relied upon the unproven burglary allegations; refusing to speculate on the weight assigned to those allegations by the judge, it ordered resentencing. State v. Black, 324 N.W.2d 313 (1982), 19 CLB 267.

18. APPEAL AND ERROR

§ 18.60. Jurisdiction

§ 18.61. —Appeal while in custody out of state

Indiana Defendant was convicted of rape, robbery, and burglary in Indiana; he was transferred to an Oklahoma prison under the Uniform Agreement on Detainers while his appeal from the Indiana convictions was pending. Subsequently, he escaped from custody and was arrested and detained on other charges in Texas.

The state of Indiana moved to dismiss his appeal in the courts of that state on account of his fugitive status.

Held, appeal dismissed and conviction affirmed. The Indiana Supreme Court found that "where the defendant in a criminal case escapes from lawful custody he is not entitled during the period he is a fugitive to prosecute his appeal."

Although defendant was incarcerated elsewhere on other charges, the court stated, he still was not subject to the jurisdiction of the Indiana courts and, accordingly, remained a fugitive.

It noted, however, that dismissal was not based upon the theory that defendant waived his right to appeal nor the theory that he should receive additional punishment for his escape. Rather, the court premised its action upon its "inherent discretion to refuse to decide what, at [that] point, [was] a moot case." Mason v. State, 440 N.E.2d 457 (1982), 19 CLB 276.

PART III—FEDERAL CRIMES

24. NATURE AND ELEMENTS OF SPECIFIC CRIMES

§ 24.15. Bank-related crimes generally

Court of Appeals, 4th Cir. After defendant was convicted in the district court for alleged violation of the statute governing loan and credit applications (18 U.S.C. § 1014) by conspiring to aid and abet a check-kiting scheme, he appealed on the ground that the evidence did not constitute a federal offense.

Held, reversed and remanded. The Fourth Circuit concluded that a check-kiting scheme is not an offense within the terms of the statute proscribing the making of a false statement or report for purposes of influencing a bank insured by the FDIC. The court thus found that defendant's efforts to fraudulently induce a bank to extend credit did not fall within the statute. The court commented that Section 1014 was not intended by Congress to be a "national bad check law." United States v. Carlisle, 693 F.2d 322 (1982), 19 CLB 265.

§ 24.45. Conspiracy

Court of Appeals, 2d Cir. Defendants moved to dismiss a count of an indictment charging them with having conspired to maliciously damage or destroy a piano store by means of explosives, which the district court granted on the ground that there was no link to interstate commerce sufficient for federal subject-matter jurisdiction.

Held, reversed and remanded. The Second Circuit found that if the government could prove that the defendants intended to destroy by means of explosives a business establishment used in activities affecting interstate commerce, then the threat to commerce was clear. The court thus found that federal jurisdiction does not depend on proof that the objective of the conspiracy had been or could have been achieved. The court further observed that the government should be given every opportunity to prove that any piano store in New York State was engaged in activity affecting commerce. United States v. Giordano, 693 F.2d 245 (1982), 19 CLB 263.

Court of Appeals, 9th Cir. Defendants, employees of Local 47 of the American Federation of Musicians, were convicted of conspiracy under the Taft-Hartley statute (29 U.S.C. § 186(b)(1)) for having received payments from a promoter of Latin American

dances in return for their approval of visa petitions of alien musicians. The union as a condition for such approval required that promoters and employers agree to hire local union musicians on a "one to one" basis with the foreign musicians. The union relied on defendants as field representatives to enforce and monitor compliance with these "one to one" agreements in the Local 47 area. Defendants contended that the evidence did not show a single conspiracy extending from 1968 to 1977, but rather two conspiracies.

Held, affirmed. The Ninth Circuit ruled that the finding of a single conspiracy was supported by sufficient evidence where the suspension of payments did not necessarily imply a termination of the conspiracy. The court reasoned that the suspension of payments was not sufficient evidence that the conspiratorial objectives were abandoned, and that a single, overall agreement of a single conspiracy need not be manifested by continuous activities. United States v. Bloch, 696 F.2d 1213 (1982), 19 CLB 376.

§ 24.90. False statement to federal department or agency

U.S. Supreme Court Defendant engaged in a series of transactions seemingly amounting to "check-kiting" between his accounts in federally insured banks. Defendant was convicted in federal district court of check-kiting and misapplication of bank funds in violation of 18 U.S.C. § 1014. On appeal, the Fifth Circuit affirmed. Certiorari was granted.

Held, reversed and remanded. The U.S. Supreme Court held that since, technically speaking, a check is not a factual assertion and cannot be characterized as "true" or "false," the petitioner's deposit in federally insured banks of several checks that were not supported by sufficient funds did not involve the making of a false statement within the meaning of the statute. The Court thus found that petitioner's conduct was not proscribed by Section 1014, observing that there was nothing in the legislative history to support a broader interpretation of the statute. Williams v. United States, 102 S. Ct. 3088 (1982), 19 CLB 72.

Court of Appeals, 11th Cir. Defendant was convicted of making a materially false statement to an IRS auditor in violation of 18 U.S.C. § 1001. He appealed on the ground that Section 1001 was inapplicable within the parameters of this case since his statement could not have affected any governmental area.

Held, affirmed. The Eleventh Circuit ruled that it was immaterial that the government is not actually influenced by the statement. The court explained that the affirmative, unsolicited false statement made by the defendant, an accountant, to a tax auditor regarding a charitable contribution not previously claimed by a taxpayer fell within the scope of the statute even though the potential effect on the government did not involve pecuniary loss; the false statement must simply have the capacity to impair or pervert the functioning of a governmental agency. United States v. Fern, 696 F.2d 1269 (1983), 19 CLB 377.

§ 24.160. Interstate racketeering

Court of Appeals, 3d Cir. Defendant, an official of Teamster Local 560 in northern New Jersey, was convicted under the RICO statute (18 U.S.C. § 1962) for running the union through a "pattern of racketeering" by receiving illegal payments from four trucking companies in order to secure "labor peace." On appeal, he argued, inter alia, that the payoffs did not constitute a pattern as required by the RICO statute.

Held, affirmed. The Third Circuit concluded that the fact that the labor union was harmed rather than benefited did not remove the illegal conduct from the ambit of the RICO statute. The court thus concluded that the record amply demonstrated that, by accepting bribes in exchange for allowing violations of the collective bargaining agreements to be overlooked, defendant was conducting his union office through racketeering activity since the acts were related to the union enterprise and his association with it. United States v. Provenzano, 688 F.2d 194 (1982), 19 CLB 170.

§ 24.190. Mail fraud

Court of Appeals, 2d Cir. Defendant, chairman of the Republican committees of both Nassau County and the town of Hempstead, New York, was found guilty after a retrial of one count of mail fraud and five counts of extortion. He appealed, arguing that he was improperly convicted under the mail fraud statute since, as a party official, he owed no general duty to the public.

Held, affirmed. The Second Circuit found that defendant, an individual who was a de

facto government leader and who was relied upon by individuals in government for the administration of government affairs, could properly be found to owe a fiduciary duty to the general citizenry of the town of Hempstead and Nassau County. Thus, a breach of that duty could serve as a predicate for violation of the mail fraud statute. The court thus concluded that public office is not a rigid prerequisite to the finding of a fiduciary duty in public-sector mail fraud cases, and the jury could have properly found that concealment of an insurance commission arrangement defrauded the public under the mail fraud statute by depriving it of a potential reduction in the cost of owning property. United States v. Margiotta, 688 F.2d 108 (1982), 19 CLB 169.

Court of Appeals, 3d Cir. After defendant was convicted in the district court of two counts of mail fraud, he appealed on the ground that the evidence of the alleged mailing was insufficient.

Held, conviction reversed on one count of mail fraud. The Third Circuit found that the testimony by the insurer's claims representative that the insurer "sends" particular documents to claimants was not evidence sufficiently establishing that the alleged mailing in fact occurred for the defendant to have properly been convicted of mail fraud. The court explained that the "generic concept" encompassed by the term "sends" does not necessarily include the specific mode of transmission denoted as "mails." In other words, the document could have been "sent" without having been "mailed" since a personal messenger could have been employed in sending the document. The court thus concluded that the testimony was too ambiguous to meet the government's burden of proving that the claim form was mailed. United States v. Hart, 693 F.2d 286 (1982), 19 CLB 264.

§ 24.215. Obstruction of justice

Court of Appeals, 9th Cir. Defendant, a police officer, was convicted of obstruction of justice under 18 U.S.C. § 1503 for attempting to warn the target of a valid search warrant in order to prevent discovery and seizure of a quantity of heroin. Defendant appealed on the ground that such conduct did not fall within the ambit of Section 1503.

Held, reversed. The Ninth Circuit stated that the obstruction of justice statute may not be construed to proscribe conduct that takes place wholly outside the context of a judicial proceeding. The court thus concluded that defendant's alleged attempts to thwart the target of a valid search warrant in order to prevent discovery and seizure of a large quantity of heroin did not fall within the scope of the statute. United States v. Brown, 688 F.2d 596 (1982), 19 CLB 172.

§ 24.250. Threats

Court of Appeals, 5th Cir. Defendant was convicted in the district court of threatening the life of the President, and he appealed on the ground that the one-count indictment was duplicitous.

The Fifth Circuit affirmed, holding that more than one threatening statement could be consolidated in a single count of the indictment where they were part of a single, continuous scheme that occurred within a short period of time and which involved the same defendant. The court thus found that the indictment was not duplicitous, notwithstanding that each statement alone might constitute an offense. The court further commented that its decision was based on a finding that defendant was properly notified of the charges against him and would not be subjected to double jeopardy. United States v. Robin, 693 F.2d 376 (1982), 19 CLB 265.

26. PARTIES

§ 26.00. Parties, aiders and abettors

Court of Appeals, 4th Cir. After defendant was convicted in the district court of aiding and abetting an embezzlement and making false entries on bank records, he appealed on the ground that the evidence was not sufficient to sustain his conviction.

Held, affirmed. The Fourth Circuit found that the evidence was sufficient to sustain defendant's conviction as an aider and abettor in the embezzlement where defendant accepted the money which his so-called wife embezzled from the bank where she worked, and that he knew she had to conceal the theft by making entries on her books. The court observed that, to be an aider and abettor, one need not be physically present at the time of the commission of the crime, but must have some interest in the criminal venture. United States v. Ray, 688 F.2d 250 (1982), 19 CLB 169.

§ 26.05. Conspirators

Court of Appeals, 9th Cir. Defendants, employees of Local 47 of the American Federation of Musicians, were convicted of conspiracy under the Taft-Hartley statute (29 U.S.C. § 186(b)(1)) for having received payments from a promoter of Latin American dances in return for their approval of visa petitions of alien musicians. The union as a condition of approval required that promoters and employers agree to hire local union musicians on a one-to-one basis with foreign musicians. On appeal, they argued that the evidence did not show a single conspiracy extending from 1968 to 1977, but rather two conspiracies, one involving payments made from 1968 to 1973 and a second involving later payments.

The Ninth Circuit affirmed, holding that the finding of a single conspiracy was supported by sufficient evidence where the suspension of payments did not necessarily imply a termination of the conspiracy. The court reasoned that the suspension of payments was not sufficient evidence that the conspiratorial objectives were abandoned, and that a single, overall agreement of a single conspiracy need not be manifested by continuous activities. United States v. Bloch, 696 F.2d 1213 (1982), 19 CLB 376.

27. DEFENSES

§ 27.00. Alibi

Court of Appeals, 2d Cir. A state correctional facility inmate sought a writ of habeas corpus on the ground that the jury had been improperly charged as to his alibi defense, which was granted in the district court.

Held, affirmed. The Second Circuit ruled that the trial court's instructions to the jury regarding petitioner's alibi defense shifted the burden of proof and thereby violated petitioner's right to a fair trial. The court of appeals adopted the reasoning of the district court, where it was concluded that the charge was erroneous and that the error could not be considered harmless. Simmons v. Dalsheim, 702 F.2d 423 (1983), 19 CLB 479.

PART IV—FEDERAL PROCEDURES

30. INDICTMENT AND INFORMATION

§ 30.00. In general

Court of Appeals, 5th Cir. Defendant was convicted in the district court of conspiracy and possession with intent to deliver heroin. On appeal, he argued that he should not have been tried on the superseding indictment after dismissal of the original one.

The Fifth Circuit reversed, holding that the prosecutor's statement that the reason for dismissing the original indictment was that a superseding indictment would be sought was insufficient to support a dismissal. The court further found that the motion to dismiss was not made in good faith since the real reason for seeking the dismissal was the government's dissatisfaction with the jury. The court observed that such reasons for dismissal are contrary to the public interest. United States v. Salinas, 693 F.2d 348 (1982), 19 CLB 265.

§ 30.05. Combining two or more separate offenses in a single count

Court of Appeals, 5th Cir. Defendant was convicted in the district court of threatening the life of the President, and he appealed on the ground that the one-count indictment was duplicitous.

Held, conviction affirmed. The Fifth Circuit ruled that more than one threatening statement could be consolidated in a single count of the indictment where they were part of a single, continuous scheme that occurred within a short period of time and which involved the same defendant. The court thus found that the indictment was not duplicitous, notwithstanding that each statement alone might constitute an offense. The court further commented that its decision was based on a finding that defendant was properly notified of the charges against him and would not be subjected to double jeopardy. United States v. Robin, 693 F.2d 376 (1982), 19 CLB 265.

31. PRETRIAL MOTIONS

§ 31.00. Sufficiency of indictment

§ 31.05. —Procedure for dismissing indictment

U.S. Supreme Court Defendants originally indicted in the Eastern District of Kentucky for

conspiracy succeeded in obtaining a change of venue to the Central District of California. In the latter district, defendants were indicted on additional substantive counts so they moved to dismiss on the ground of prosecutory vindictiveness, which was denied. On appeal, the Ninth Circuit held that the denial of the motion to dismiss was immediately appealable as a final decision under 28 U.S.C. § 1291. Certiorari was granted.

Held, reversed with instructions. The U.S. Supreme Court held that an order denying a motion to dismiss based on vindictiveness on the part of the prosecutor is not one of those rights that must be vindicated before trial, if at all. The Court reasoned that while there was superficial plausibility to the contention that any constitutional claim would be dispositive of the entire case if decided favorably to a criminal defendant, the policy against piecemeal appeals in criminal cases would be swallowed by ever-multiplying exceptions. United States v. Hollywood Motor Car Co., 102 S. Ct. 3081 (1982), 19 CLB 72.

Court of Appeals, 5th Cir. Defendant was convicted in the district court of conspiracy and possession with intent to deliver heroin. On appeal, he argued that he should not have been tried on the superseding indictment after dismissal of the original one.

Held, conviction reversed. The Fifth Circuit stated that the prosecutor's statement that the reason for dismissing the original indictment was that a superseding indictment would be sought was insufficient to support a dismissal. The court further found that the motion to dismiss was not made in good faith since the real reason for seeking the dismissal was the government's dissatisfaction with the jury, i.e., that there were some people on the jury that knew defendant. The court observed that such reasons for dismissal are contrary to the public interest. United States v. Salinas, 693 F.2d 348 (1982), 19 CLB 265.

§ 31.10. —Severance

Court of Appeals, 3d Cir. Defendant was convicted of conspiracy to transport stolen goods in interstate commerce and several firearm offenses. He claimed, on appeal, among other things, that the trial court improperly denied his motion for a severance.

Held, affirmed. The Third Circuit concluded that the district court did not abuse its discretion by denying severance even though the testimony of certain witnesses tended to implicate defendant in criminal matters unrelated to the charges for which he was then being tried. The court observed that a severance motion is directed to the discretion of the trial judge, who is in the best position to waive possible prejudice to the defendant from a joint trial; and that the severance would not have affected such testimony since the witness would presumably have been called upon by the government to testify against each defendant. United States v. Frankenberry, 696 F.2d 239 (1982), 19 CLB 379.

32. DISCOVERY

§ 32.00. In general

§ 32.10. —Statements of witnesses

Court of Appeals, 2d Cir. After defendant-contractor was convicted of making illegal payments to a union official and of perjury before the grand jury, he appealed on the ground that the government had failed to disclose the grand jury testimony of three witnesses who had stated that they had received the proceeds of supplemental "travel expense" checks issued by the defendant.

Held, affirmed. The Second Circuit found that the grand jury testimony of the three witnesses was not material within the meaning of the *Brady* rule, Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963). Their testimony was completely unrelated to the jury conviction which was based upon defendant's denial before the grand jury that he had discussed "travel expense" checks with a union clerk and another. The court reasoned that failure to disclose material information under *Brady* violates due process only when the defendant is denied access to exculpatory evidence known only to the government, and the government is not obligated to supply a defendant with all evidence in its possession which might conceivably assist the preparation of his defense. United States v. LeRoy, 687 F.2d 610 (1982), 19 CLB 171.

§ 32.15. —Identity of witnesses

Court of Appeals, 7th Cir. Defendant was convicted of federal bank robbery. On appeal, he claimed that the district court committed re-

versible error when it refused to strike the testimony of witnesses linking him to the scene of the crime on the ground that their identities had not been disclosed to him prior to the trial.

Held, affirmed. The Seventh Circuit concluded that due process did not require the government to furnish names of witnesses linking defendant to the scene of the crime even though defendant had made unsolicited disclosure of alibi witnesses. The court observed that Federal Rule of Criminal Procedure 16 does not entitle a defendant in a noncapital case to lists of prospective government witnesses, and that discovery under the alibi rule may only be triggered by a prosecution request, which did not occur in this case. The court further found that the court had properly excluded the proffered testimony from two witnesses since the testimony was irrelevant to the charges against defendant. United States v. Bouye, 688 F.2d 471 (1982), 19 CLB 168.

33. GUILTY PLEAS

§ 33.15. Accepting plea

§ 33.20. —Duty to inquire as to voluntariness of plea

Court of Appeals, 1st Cir. A state prisoner convicted of armed robbery and related charges appealed from a dismissal by the district court of his petition for habeas corpus on the ground that his forty-to-fifty-year sentence was the result of his refusal to plead guilty. The court of appeals ordered that the writ be issued, and on certiorari, the U.S. Supreme Court vacated and remanded.

Held, habeas corpus granted. The First Circuit concluded that the state prisoner was entitled to habeas corpus relief where the trial judge had informed him during trial that if he did not follow his advice to bargain and plead, a substantial sentence might be imposed if the jury convicted him. The court particularly noted that there was a gross disparity between the three-year sentence given his co-defendant, who pleaded guilty, and the forty-to-fifty-year sentence given him. This disparity was too great to allay a reasonable apprehension that the judge's remarks were unjudicial urgings to plead and that the sentence was a retaliatory consequence of his refusal. Longval v. Meachum, 693 F.2d 236 (1982), 19 CLB 263.

34. EVIDENCE

ADMISSIBILITY AND WITNESSES

§ 34.20. Variance between pleading and proof

Court of Appeals, 2d Cir. After defendants were convicted in the district court of conspiracy to distribute and possession with intent to distribute heroin, they appealed on the ground that there was a fatal variance between the conspiracy charged and that proven.

Held, conviction affirmed. The Second Circuit found that even if variance existed between the conspiracy charge and the conspiracy proven, reversal was not required absent a showing of substantial prejudice. The court noted that whether the evidence shows multiple conspiracies or a single conspiracy is a question of fact for a properly instructed jury. The court here concluded that the variance created no substantial prejudice where there were no hearsay statements uttered by members of one of the conspiracies that were used to the detriment of a member of another; only four of nineteen defendants went to trial; and multiplicity of the verdicts indicated that there was no prejudicial spillover effect and no shocking or inflammatory evidence introduced. United States v. Carson, 702 F.2d 351 (1983), 19 CLB 478.

§ 34.95. Identification evidence

Court of Appeals, D.C. Cir. After the jury returned a guilty verdict for armed robbery against the defendant, the district court granted his motion for a judgment of acquittal on the ground that the "show up" identification evidence was insufficient to sustain a conviction.

Held, judgment vacated in part, affirmed in part and case remanded. The Court of Appeals for the District of Columbia found that although the show-up identification was highly suggestive, it did not mandate a conclusion that the evidence was insufficient to sustain the armed robbery conviction. The court noted that the show-up took place under circumstances that would tend to promote its reliability in that it took place two or three minutes after the robbery at the scene of the crime, and the show-up involved witnesses who had ample opportunity to view the culprits at close range in good lighting conditions. United States v. Singleton, 702 F.2d 1159 (1983), 19 CLB 481.

§ 34.100. —Prior identification

Court of Appeals, 9th Cir. Defendant was convicted of murder by a California state court. He appealed his conviction through the California state court system without success. Defendant then sought collateral relief in the federal courts. The district court refused to issue a writ of habeas corpus while the Ninth Circuit twice gave judgment in favor of defendant (611 F.2d 754, 649 F.2d 713), and twice had its opinion remanded by the U.S. Supreme Court with instructions to comply with the requirements of 28 U.S.C. § 2254(d) (449 U.S. 539, 101 S. Ct. 764; 455 U.S. 591, 102 S. Ct. 1303). Defendant contended that his Fourteenth Amendment due process rights were violated by pretrial identification procedures based on in-court identifications made after prior photographic identifications.

Held, reversed and remanded. The Ninth Circuit ruled that the photographic identification procedures employed by the California state prison to obtain identification of murderers of an inmate were impermissibly suggestive and gave rise to a very substantial likelihood of in-court misidentification. The court observed that the witnesses were shown photographs on two or three occasions before making identification, they were housed in segregation with the defendants and saw the defendants taken to have their pictures retaken, and the prison authorities brought pressure to bear upon one witness by threatening to "ship" him if he did not cooperate. The court further commented that the relative unreliability of photographic arrays in comparison with corporal lineups was a factor to be considered in determining whether the identification procedure was impermissibly suggestive. Mata v. Sumner, 696 F.2d 1244 (1983), 19 CLB 376.

§ 34.120. Competency of witness

Court of Appeals, 4th Cir. Defendant was convicted of assault with intent to commit murder. McKinley, an inmate in a Virginia reformatory, sustained serious stab wounds from an assault in his cell. McKinley's fellow inmates, defendant and McDuffie, were investigated but only defendant was charged. McDuffie was not indicted because a court-appointed psychiatrist found him incompetent to stand trial and criminally insane at the time of the assault. At trial, the defense attempted to have McDuffie testify that only he and not defendant had assaulted McKinley. The court ruled McDuffie incompetent to testify because he had been found criminally insane and was subject to hallucinations. Defendant appealed.

Held, reversed and remanded. The Fourth Circuit held that defendant was denied a fair trial as a result of the trial court's disqualification of the alleged accomplice from testifying despite the fact that the alleged accomplice had been found criminally insane and incompetent to stand trial and was subject to hallucinations. The court reasoned that every witness is presumed to be mentally competent to testify unless it can be shown that he does not have the capacity to recall, and that in this case the physician for the alleged accomplice indicated that the witness had sufficient memory, and that he understood the oath. The court further found that since the district court chose not to conduct an in camera examination, it was improper to disqualify the alleged accomplice from testifying. United States v. Lightly, 677 F.2d 1027 (1982), 19 CLB 75.

§ 34.170. Cross-examination procedure

§ 34.200. —Impeachment for prior illegal or immoral acts

Court of Appeals, D.C. Cir. After the defendant was convicted of possession of heroin with intent to distribute, he appealed on the ground that the trial court had improperly admitted evidence of prior convictions of the defendant and some of his witnesses.

Held, conviction affirmed. The Court of Appeals for the District of Columbia Circuit ruled that the prior crime evidence had been properly admitted under Federal Rule of Evidence 609(a). The court noted that the district court has wide discretion to decide how much background information, if any, it needs to balance the probativeness of the evidence against the prejudice to the defendant in determining whether to admit evidence of prior convictions of defendants and witnesses for purposes of impeachment. The court thus found that the trial court did not abuse its discretion in admitting defendant's prior conviction of robbery in a prosecution for heroin possession, and it further found that the court properly permitted a defense witness to be impeached by a five-year-old armed robbery conviction since it involved theft and indicated conscious disregard for the rights of others. United States v. Lipscomb, 702 F.2d 1049 (1983), 19 CLB 480.

§ 34.225. Admissions and confessions

§ 34.230. —Business records exception

Court of Appeals, D.C. Cir. Defendant was convicted of selling government property in violation of 18 U.S.C. § 641. On appeal, he contended, among other things, that it was error to admit into evidence certain claim forms completed by intended payees of Treasury checks.

Held, conviction affirmed. The Court of Appeals for the District of Columbia Circuit found that, while the forms did not fall within any hearsay exception, their admission was harmless error. The court explained that the forms completed by intended payees did not fall within the hearsay exception for records of regularly conducted activity since the intended payees were not acting in the regular course of business. However, the court concluded that the admission of the forms was harmless error since there was convincing, properly admitted evidence of all essential elements of the case, and the evidence of the defendant's guilt was overwhelming. United States v. Baker, 693 F.2d 183 (1982), 19 CLB 262.

§ 34.245. —Photographs

Court of Appeals, D.C. Cir. After the defendant was convicted in the district court of unlawful possession of a controlled substance with intent to distribute, he appealed on the ground that five photographs introduced at a first trial resulting in a mistrial, depicting the environs in which the drug transactions took place, should have been introduced at the trial resulting in the conviction.

Held, conviction affirmed. The Court of Appeals for the District of Columbia Circuit ruled that admission of the photographs in the first trial did not require their admission in the second one. The court explained that the doctrine of law of the case did not operate under the circumstances since the previous trial was a nullity. The court further found that the trial court's ruling that the photographs were inadmissible was clearly within his discretion where none of the photographs depicted the view the officers had from the second story window at the rear of the building from which they observed the principal transactions and articles which proved defendant's guilt. United States v. Akers, 702 F.2d 1145 (1983), 19 CLB 480.

§ 34.260. —Use of prior testimony

Court of Appeals, 4th Cir. After defendant was convicted in the district court of conspiracy to import marijuana and related offenses, he appealed on the ground that portions of a witness's grand jury testimony had been improperly admitted.

Held, affirmed. The Fourth Circuit found that any error in the exclusion of portions of the grand jury testimony was harmless. While questioning the propriety of admitting into evidence any grand jury testimony of a trial witness at all, the court concluded that the exclusion of portions of the grand jury testimony was harmless since the excluded portions could only have harmed, not helped, defendant's case. The court further found that since the excluded portions did not contain any established falsehoods, no unreliability would have been cast upon the witness's testimony by its admission. United States v. Walker, 696 F.2d 277 (1983), 19 CLB 380.

§ 34.261. —Recorded statements

Court of Appeals, 11th Cir. Defendant was convicted in a jury trial on charges arising out of a drug importation and distribution conspiracy. Defendant objected to the admission of a tape recording under Federal Rule of Evidence 404 on the ground that it constituted inadmissible evidence of extrinsic offenses for the purpose of proving defendant's bad character.

Held, affirmed. The Eleventh Circuit concluded that the admissions of defendant in tape-recorded statements concerning the pitfalls of dealing in marijuana and the troubles he and several of his acquaintances had been involved in did not constitute an abuse of discretion. The court reasoned that although the statements may have led the jury to believe that the defendant was involved in nonindicted, extrinsic offenses, they were relevant to prove his knowledge of drug importation and distribution. The probative value of the conversation thus was not outweighed by its prejudicial impact. United States v. Edwards, 696 F.2d 1277 (1983), 19 CLB 377.

35. THE TRIAL

§ 35.50. Conduct of trial judge

§ 35.55. —Examination of witnesses

Court of Appeals, 4th Cir. Defendant was convicted in Maryland state court of rape, fel-

ony murder, and burglary by a jury and was sentenced to life imprisonment. An alibi comprised practically defendant's entire defense, and if believed would have made it highly unlikely that defendant had committed the crimes. The alibi presented by defendant and two of his friends was weakened by the conduct of the trial judge in openly and successfully pressing defendant's two key alibi witnesses to change their testimony. Defendant was granted a writ of habeas corpus in the district court.

Held, the granting of a writ of habeas corpus affirmed. The Fourth Circuit found that the trial court's conduct in openly and successfully pressing the defendant's two key alibi witnesses to change their testimony blatantly interfered with defendant's Sixth Amendment right to call witnesses in his own behalf. The court further found that defendant's Fourteenth Amendment due process right to a fair trial was violated where the state trial judge's remarks clearly indicated his disbelief of the alibi witnesses's first testimony and unquestionably influenced the jury's appraisal of their credibility. The court observed that the trial judge's comments must be neutral and must not be given so as to intimidate witnesses or otherwise interfere with the ascertainment of truth. Anderson v. Maryland, 696 F.2d 296 (1982), 19 CLB 380.

§ 35.70. —Exclusion of evidence

Court of Appeals, 4th Cir. After defendant was convicted in the district court of conspiracy to counterfeit, he appealed on the ground that the court had improperly excluded testimony he had offered about improbable and farfetched, though legal, money-making schemes previously engaged in by him. The purpose of the defense was to demonstrate that defendant often took unrealistic fantasy trips and that his interest in counterfeiting was just another pipe dream.

Held, affirmed. The Fourth Circuit found that the district judge acted well within his discretion and did not abuse it in preventing the introduction of such collateral testimony, which would have distracted the jury from relevant evidence. The court reasoned that a trial judge has wide discretion as to relevance and materiality of evidence, and such a ruling will not be disturbed on appeal absent a clear showing of an abuse of discretion. United States v. Molovinsky, 688 F.2d 243 (1982), 19 CLB 170.

§ 35.85. Restrictions on right of cross-examination

Court of Appeals, 9th Cir. After defendant was convicted in the district court of receiving stolen property, he appealed on the ground that the court had improperly denied him the right to fully cross-examine the alleged victim.

Held, affirmed. The Ninth Circuit concluded that the court's refusal to admit prior sworn testimony of a government witness as to the dimensions of a stolen trailer was not improper since the defense counsel questioned the witness about his prior inconsistent statements and had a full opportunity to challenge the witness's credibility during the trial, both during questioning and summation. United States v. Miller, 688 F.2d 652 (1982), 19 CLB 172.

§ 35.95. Conduct of prosecutor

Court of Appeals, 11th Cir. After his conviction in the district court on narcotics charges, defendant appealed on the ground that it was reversible error for the prosecutor to state during closing argument that defendant had dealt in illicit drugs and been caught and that defendant was "guilty."

Held, affirmed in part, vacated in part. The Eleventh Circuit found that the prosecutor's remarks during summation were harmless since the trial court gave an immediate curative instruction and since the evidence of defendant's guilt was overwhelming. The court observed that while it is clearly improper for the prosecution to express its personal belief in the accused's guilt, and there was the danger that the jury might be left with the impression that the prosecutor's statement was based in part on facts not in evidence, the prosecutor's misconduct alone does not require reversal unless the misconduct deprives defendant of a fair trial. United States v. Butera, 677 F.2d 1376 (1982), 19 CLB 76.

§ 35.110. —Comments made during summation

Court of Appeals, 4th Cir. Defendant was convicted by a jury of bank robbery, bank larceny, and assault with a dangerous weapon during a bank robbery where identification was the central issue. The question on appeal was whether the prosecutor's closing argument, which stated that defendant's approaching and examining blow-ups of the bank's surveillance photographs and his explanation of those pho-

tographs to his lawyer constituted evidence of defendant's guilt, was reversible error.

Held, reversed and remanded. The Fourth Circuit found that identification was the central issue in the trial, and that the prosecutor's remarks constituted comment on the defendant's exercise of his rights to a fair trial and to counsel, and was an improper attempt to introduce evidence of the character of the accused solely to prove guilt. The court particularly noted that defense counsel immediately objected to the comment and was admonished by the trial judge for his "outbreak." United States v. Carroll, 678 F.2d 1208 (1982), 19 CLB 77.

§ 35.115. —Comment on defendant's failure to testify

Court of Appeals, 3d Cir. After defendant was convicted in New Jersey state court of murder and related offenses, he was granted a writ of habeas corpus in the district court on the ground that the prosecutor had improperly commented on his failure to testify. At trial, the state judge took the unusual step of permitting defendant, who had not testified, to deliver a summation to the jury in addition to that made by counsel. On rebuttal, the prosecution pointed out the defendant's failure to discuss crucial elements of the case.

Held, writ of habeas corpus vacated. The Third Circuit concluded that the prosecutor did not comment on the defendant's failure to testify. The court explained that the prosecutor's rebuttal was directed not at the defendant's lack of testimony as such, but rather to the closing argument, and that the prosecutor's questioning about the gaps in defendant's narrative is a common way of attacking a defense summation. Bontempo v. Fenton, 692 F.2d 954 (1982), 19 CLB 266.

36. THE JURY

INSTRUCTIONS

§ 36.85. Duty to charge on defendant's theory of defense

Court of Appeals, 11th Cir. Defendants were convicted of smuggling illegal aliens into the United States in violation of 8 U.S.C. § 1324(a)(1) and 18 U.S.C. § 2. On appeal, they claimed that the district court judge had improperly failed to give defendants' requested instruction to the jury embodying a purported theory of defense.

Held, affirmed. The Eleventh Circuit stated that terming a proposed jury instruction as a "theory of defense" does not automatically require that it be given. The court further observed that the requested instruction was unnecessary since the first part was included in the jury charge and the remainder was either not supported by the testimony or was substantially covered in the instructions given. United States v. Pierre, 688 F.2d 724 (1982), 19 CLB 170.

§ 36.95. Duty to charge on essential elements of crime

Court of Appeals, 6th Cir. Defendant was convicted by a jury for conspiracy to distribute, distribution, and possession of cocaine. Defendant was sentenced to a five-year term on the conspiracy counts and a single five-year sentence on the other two counts, both sentences to run concurrently. He appealed on the ground that the trial judge gave merely a general charge on the law of conspiracy without relating the law to the facts of the case.

Held, reversed and remanded for resentencing. The Sixth Circuit stated that without an instruction that sets out specifically what acts would constitute defendant's agreement in the conspiracy count, the jury could not adequately consider the conspiracy count since the essential ingredient in the crime of conspiracy is agreement. What the jury needed to consider and find is that defendant shared in the conspiracy. The instructions given by the trial judge merely stated that willful participation is needed. The jury is required to find that defendant willfully acted with the intent to further the conspiracy. United States v. Piccolo, 696 F.2d 1162 (1983), 19 CLB 375.

§ 36.110. Intent and willfulness

U.S. Supreme Court After the defendant was convicted in Connecticut state court of attempted murder, kidnapping, robbery, and sexual assault, the Connecticut Supreme Court reversed his convictions for attempted murder and robbery and certiorari was granted.

Held, affirmed. The U.S. Supreme Court found that where the trial court told the jury that intent may be inferred from conduct and that every person is conclusively presumed to

intend the natural and necessary consequences of his acts, the convictions for attempted murder and robbery must be reversed since the error was not harmless. However, the Court further found that where the kidnapping instruction was couched in the permissive language of inference, the error as to that aspect of the charge was upheld. The Court also upheld the conviction as to sexual assault since it is not a specific intent crime. Connecticut v. Johnson, 103 S. Ct. 969 (1983), 19 CLB 476.

Court of Appeals, 2d Cir. After the defendant was convicted in the district court of escape, he appealed on the ground that the trial court had improperly denied him a duress defense.

Held, conviction affirmed. The Second Circuit ruled that the defense was not entitled to a duress defense and the trial court properly ruled on the proffered duress defense prior to any defense testimony being taken before the jury. The court explained that in order to establish the duress defense, the prisoner charged with the attempted escape must have been faced with the specific threat of death or substantial bodily injury in the immediate future, there must have been no time for complaint to authorities or have existed a history of futile complaints which made any benefit from such complaints illusory. The court further found that a prisoner must have had the intention to report immediately to the proper authorities after his escape in order to avail himself of the duress defense. United States v. Bifield, 702 F.2d 342 (1983), 19 CLB 478.

Court of Appeals, 9th Cir. Defendant was convicted in the district court of possession of cocaine with intent to distribute and conspiracy to distribute cocaine. He appealed on the ground that the trial judge had improperly charged the jury that it could find that defendant had the requisite knowledge if he was aware of the high probability that a drug deal was taking place and deliberately avoided learning the truth.

Held, reversed. The Ninth Circuit concluded that the trial judge had erred prejudicially in granting the government's request that the "conscious avoidance" instruction be read to the jury since there was insufficient evidence for the jury to reasonably conclude that the defendant contrived to avoid learning of the drug deal. The court observed that even if the circumstances are highly suspicious, the instruction is improper unless the defendant acted deliberately to avoid learning the truth. United States v. Garzon, 688 F.2d 607 (1982), 19 CLB 171.

§ 36.120. Limiting and cautionary instructions

Court of Appeals, D.C. Cir. After his conviction for unlawfully transporting falsely made, forged, and altered securities, defendant appealed on the ground that the admission of evidence concerning possible crimes and illegal acts other than those charged in the indictment was improper and required an immediate limiting instruction at trial.

Held, conviction affirmed. The District of Columbia Circuit Court found that the admission of similar act evidence was proper and that the lack of an immediate limiting instruction regarding such evidence did not require reversal. The court noted that the evidence in question was proper since it was admitted to show that defendant had a scheme which included offenses for which he was on trial. The court further explained that the failure to give an immediate limiting instruction was not reversible error since the evidence was not inflammatory, the trial court supervised the presentation of the evidence, and the court provided adequate cautionary instructions during the final charge to the jury. United States v. Lewis, 693 F.2d 189 (1982), 219 CLB 262.

§ 36.150. Prejudicial comments by trial judge during charge

Delaware Defendant was convicted of first-degree reckless endangerment, a felony, and possession of a deadly weapon during commission of a felony; he had fired a shotgun at the complainant during an argument which arose over a traffic incident.

At trial, the court also instructed the jury on the lesser included offense of second-degree reckless endangerment a misdemeanor, and charged that the jury could not find defendant guilty of the weapons charge unless it found him guilty of the felony-level reckless endangering offense.

After an hour's deliberation, the jury returned and asked the court if leniency could be requested for defendant if he were found guilty as charged. The trial judge stated, in substance, that he was responsible for sentencing and had broad discretion to consider back-

ground information and other factors favorable to defendant in imposing sentence. The jury's function, explained the court, was to reach a determination based on the evidence. In actuality, though, the weapons charge carried with it a mandatory minimum five-year prison sentence without the possibility of suspension, probation, or parole for five years.

Shortly after retiring to deliberate, the jury returned with a verdict of guilty of the felony reckless endangerment and weapons charges. Defendant asserted on appeal that the jury was induced, by the judge's comments, to reach a more severe verdict.

Held, reversed and new trial ordered. The Delaware Supreme Court stated that "the jury's task was to decide guilt or innocence, and instructions going beyond that issue distract the jury from its role and are impermissible."

Even though the trial judge cautioned the jury that its only function was to determine guilt or innocence, he gave the impression that he had greater latitude in sentencing than was the case, said the court, noting that "the cautionary remarks did not negate the possibility that the jury's deliberations would be affected by the potential leniency to be shown by the judge after he received the presentence report."

As there was evidence tending to establish that defendant was guilty of the lesser included offense and not the higher degree felony, the court refused to find the erroneous comments harmless beyond a reasonable doubt. Kauffman v. State, 452 A.2d 945 (1982), 19 CLB 386.

DELIBERATION

§ 36.185. Extrajudicial communications

Court of Appeals, 5th Cir. After having been convicted in Texas state court for aggravated rape and sentenced to sixty years in jail, defendant sought habeas corpus relief in the federal district court on the ground that he was denied a fair trial by virtue of third-party contacts with several members of the jury after the jury had returned a guilty verdict but before the sentencing phase of the trial. Apparently, a crowd of irate citizens confronted the jurors outside the courthouse after the return of the guilty verdict.

Held, affirmed in part, reversed in part. The Fifth Circuit found that the contacts did not deprive defendant of a fair trial since the transcript revealed that there was no discussion of the jury contacts during deliberations by the jury on the sentencing phase. The court further observed that it was entirely unpredictable whether the contacts moved the jurors to be more harsh or more lenient, and defendant did not receive the maximum sentence available. Miller v. Estelle, 677 F.2d 1080 (1982), 19 CLB 75.

37. POST-TRIAL MOTIONS

§ 37.10. Motion to vacate conviction

§ 37.25. —Failure to raise claim at trial or on direct appeal as bar

Court of Appeals, 1st Cir. Defendants were convicted in the district court of mail fraud and racketeering and, on appeal, they argued that the evidence produced by the government relating to the mailing was insufficient to support a conviction.

Held, affirmed. The First Circuit ruled that defendants had waived their original motion for acquittal by failing to renew the motion after presenting evidence. The court explained that this rule is based on the sound principle that evidentiary challenges should be put in the first instance to the trial judge, who is in the best position to rule on such matters, and that this rule should be waived only when a defendant demonstrates "clear and gross" injustice. United States v. Greenleaf, 692 F.2d 182 (1982), 19 CLB 264.

§ 37.35. Federal habeas corpus

§ 37.45. —Requirement of custody

Court of Appeals, 5th Cir. Petitioner, after having been convicted and fined for violating the Texas "failure to identify" law, brought a federal habeas corpus action challenging the constitutionality of the state statute. The federal district court granted the petition, and the state appealed.

Held, reversed and remanded. The Fifth Circuit found that an arrest warrant issued for willful refusal to pay a fine does not amount to "custody" in habeas cases challenging the constitutionality of a statute that imposes a fine. The court reasoned that to warrant a finding that a petitioner is "in custody" for purposes of federal habeas corpus jurisdiction in a "fine only" case, there must be present some sort of supervisory control over the petitioner. The court further found that the requisite super-

vision was entirely lacking and that there were no restraints on the petitioner's liberty. Spring v. Caldwell, 692 F.2d 994 (1982), 19 CLB 266.

§ 37.50. —Exhaustion of state remedies

U.S. Supreme Court After a Michigan state prisoner's petition for federal habeas corpus was conditionally granted by the district court, and affirmed by the Court of Appeals for the Sixth Circuit, certiorari was granted.

Held, reversed and remanded. The U.S. Supreme Court found that the petitioner had failed to exhaust his state remedies as required by the federal habeas corpus statute. The Court noted that the district court's grant of relief was based on the doctrine that certain "mandatory presumptions" may undermine the prosecution's burden to prove guilt beyond a reasonable doubt and thus deprive a criminal defendant of due process, but the Michigan courts had not had a fair opportunity to review this constitutional claim. The Court further explained that it is not enough that all the facts necessary to support the federal claim were before the state courts if no fair opportunity was given to apply controlling legal principles to the facts. Anderson v. Harless, 103 S. Ct. 276 (1982), 19 CLB 262.

Court of Appeals, 2d Cir. Defendant was convicted in New York state court of felony murder, intentional murder, and robbery. His appeal concerns the standard for determining whether state remedies have been exhausted so as to permit federal habeas corpus review of a state court conviction. His petition was denied in the district court.

Held, vacated and remanded. The Second Circuit en banc stated that the general principle governing assessment of whether a fair trial claim in state court is of a constitutional dimension so as to satisfy the exhaustion requirement of the habeas corpus statute is that where the claim rests on a factual matrix that is well within the mainstream of due process adjudication, state courts must be considered to have been alerted to its constitutional nature. If, on the other hand, the claim is based on a fact pattern not theretofore commonly thought to involve constitutional constraints, there is little reason to believe courts were alerted to its supposed constitutional nature. Therefore, defendant had exhausted his state remedies for the purpose of the habeas corpus statute with regard to his claim that he was deprived of his fundamental right to a fair trial due to the partiality of the trial judge in favor of the prosecution. Daye v. Attorney General, 696 F.2d 186 (1982), 19 CLB 378.

§ 37.60. —Burden of proof

U.S. Supreme Court During an Ohio State court proceeding resulting in respondent's murder conviction, the state court judge conducted a hearing to determine whether respondent's guilty plea to an Illinois murder was knowing and voluntary. After the court found that respondent had intelligently and voluntarily entered his plea of guilty, the Ohio Court of Appeals affirmed. The respondent was then denied federal habeas corpus relief in the district court, but the court of appeals reversed, since there was no express finding made concerning respondent's credibility as a witness.

Held, reversed. The U.S. Supreme Court ruled that the court of appeals erroneously applied the "fairly supported by the record" standard for reviewing state court findings. The Court observed that Section 2254(d) gives federal habeas courts no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court but not by them. The Court, observing that the respondent must have been informed of the charges on which he was indicted in Illinois, thus found that his plea of guilty to the Illinois charge was voluntary. Marshall v. Lonberger, 103 S. Ct. 843 (1983), 19 CLB 477.

38. SENTENCING AND PUNISHMENT

SENTENCING

§ 38.35. Invalid conditions

Court of Appeals, 2d Cir. Defendant pled guilty to a violation of 21 U.S.C. § 331(b), which prohibits the adulteration or misbranding of drugs, which is punishable by a maximum fine of $1,000 and one year in jail. He also pled guilty as a corporate officer to a violation of the false statement statute (18 U.S.C § 1001), a felony punishable by a maximum fine of $10,000. Defendant was fined $1,000 and his corporation was fined $10,000. As a condition of his probation, he was required to pay both the individual and corporate fines. His motion to correct the sentence was denied in the district court.

Held, reversed. The Second Circuit stated that defendant's probation was improperly conditioned on his payment of a fine imposed upon his corporation in excess of the maximum fine to which he was individually subject and which he was sentenced to pay. The court reasoned that the sentencing courts may not impose conditions of probation that circumvent the statutory maximum penalty set by Congress. Fiore v. United States, 696 F.2d 205 (1982), 19 CLB 379.

§ 38.40. Sentence not contemplated by plea

Court of Appeals, 3d Cir. Defendant pleaded guilty to a one-count income tax violation pursuant to a plea agreement in which the government promised that if a sentence of over one year was imposed, he would serve no more than one-third of the sentence. After he was sentenced to three years in prison, he moved to correct the sentence on the grounds that the U.S. Parole Commission Guidelines frustrated the agreement. His motion was denied by the district court.

Held, judgment vacated; case remanded. The Third Circuit found that defendant did not waive his right to object to the presence of certain information in the pre-sentence report when he failed to object prior to sentencing. The court reasoned that sentencing procedures and, especially, sentencing hearings need not conform to the procedural rules applicable at trial, particularly the rule that failure to make an immediate objection constitutes a waiver. The court found, however, that the parole guidelines did not violate the plea bargain agreement. United States v. Baylin, 696 F.2d 1030 (1982), 19 CLB 375.

PUNISHMENT

§ 38.60. Credit for time spent in custody prior to sentencing

Court of Appeals, 11th Cir. After his conviction for counterfeiting, petitioner filed a petition for a writ of mandamus to compel the attorney general to credit against his sentence time spent in a federal community treatment center subsequent to conviction, but before sentencing. The district court issued the writ of mandamus and the government appealed.

Held, affirmed. The Eleventh Circuit ruled that failure to give the pre-sentence detainee credit for time spent in the center violated the equal protection component of the Fifth Amendment due process clause. The court reasoned that the time should be so credited because petitioner was treated in precisely the same fashion as, and under restrictions identical to, those imposed on inmates who were serving sentences already imposed. The court further explained that where the government actually tells a pre-sentence detainee that he is subject to the threat of prosecution for failing to return to the treatment center, it should not later claim that the threat of prosecution was merely a subjective and erroneous belief on the part of the petitioner. Johnson v. Smith, 696 F.2d 1334 (1983), 19 CLB 377.

§ 38.85. Multiple offender sentences

U.S. Supreme Court The petitioner pled guilty to the charge of carrying a pistol without a license, and he was placed on probation for two years under the Youth Correction Act (YCA). At the end of the probationary period, he was unconditionally discharged from the YCA program. The petitioner was later convicted again for the same offense, and he was sentenced to imprisonment as a felon as a recidivist. The District of Columbia Court of Appeals affirmed.

Held, conviction affirmed. The U.S. Supreme Court found that the YCA conviction was properly used to enhance the sentence since the court had not exercised its discretion to set aside the conviction prior to the expiration of the period of probation. The Court observed that this limitation was fully consistent with the YCA's rehabilitation purposes as well as with Congress's intent to employ the set-aside as an incentive for positive behavior by youths sentenced under the YCA. Tuten v. United States, 103 S. Ct. 1412 (1983), 19 CLB 475.

39. THE APPEAL

§ 39.00. Right to appeal

Court of Appeals, D.C. Cir. A defendant charged with drug offenses appealed from orders of the district court denying his motion for judgment of acquittal and his motion to dismiss on the grounds of former jeopardy.

Held, appeal dismissed. The Court of Appeals for the District of Columbia Circuit concluded that the trial court's denial of a double jeopardy claim based on the insufficiency of the evidence at trial, which resulted in a hung

jury, was not immediately appealable. The court explained that to come within the collateral order exception to the final judgment rule, a decision must fully dispose of the controverted issue; it must not be simply a step toward final disposition of the merits of a case, but must resolve the issue completely collateral to the cause of action asserted. The court reasoned that the claim would not be lost if not reviewed immediately since it could be raised on appeal if there was a subsequent conviction. United States v. Richardson, 702 F.2d 1079 (1983), 19 CLB 480.

§ 39.10. Jurisdiction

§ 39.20. —Failure to file timely notice of appeal

U.S. Supreme Court Defendant applied to Justice Rehnquist for a stay of dismissal of his appeal by the Ninth Circuit from the U.S. Tax Court. The ground for the application was that defendant was a fugitive from justice for convictions of willfully attempting to evade federal employment taxes. The Ninth Circuit had ruled that applicant could move to reinstate his appeal if within fifty-six days he submitted himself to the jurisdiction of the court from which he was a fugitive.

Held, application denied. Justice Rehnquist ruled that the stay, applied for on the last of the fifty-six days, would not be granted as there was no reasonable possibility that four Justices would vote to grant certiorari and since applicant failed to seek a stay in the court of appeals. Conforte v. Comm'r, 103 S. Ct. 663 (1983), 19 CLB 374.

§ 39.65. Bail pending appeal

U.S. Supreme Court After defendant was found guilty of criminal contempt and sentenced to a prison term, he sought a stay pending review on certiorari of the judgment of the Massachusetts Supreme Judicial Court.

Held, application for stay denied. Justice Brennan, sitting as a circuit justice, denied the application for a stay, holding that even though the applicant who had been sentenced to ninety days in prison for criminal contempt had shown irreparable harm, the petition for a stay failed to demonstrate that the balance of equities in his favor was sufficient to warrant grant of a stay. Justice Brennan explained that he strongly doubted that certiorari would be granted or that the judgment would be reversed. Corsetti v. Massachusetts, 103 S. Ct. 3 (1982), 19 CLB 261.

§ 39.66. Stay pending application for writ of certiorari

U.S. Supreme Court A Florida state prisoner was convicted of first-degree murder and sentenced to death. After his conviction was affirmed by the Florida Supreme Court, he petitioned the U.S. Supreme Court for a stay pending the disposition of his petition for a writ of certiorari.

Held, application for stay denied. The Supreme Court denied the application for a stay where there was no threat of imminent harm. The Court explained that no execution date had been set and the state did not contemplate that one would be set in the near future. Moreover, there was no basis for determining whether certiorari would be granted since the application for a stay did not specify either the issues for which certiorari would be sought or the reasons review would be appropriate. White v. Florida, 103 S. Ct. 1 (1982), 19 CLB 261.

40. PROBATION AND PAROLE

§ 40.05. Revocation of probation

Court of Appeals, 3d Cir. The probationer appealed from an order of the district court revoking his probation and imposing a term of five years' imprisonment, arguing that evidence of an illegal search and seizure was improperly admitted at trial.

The Third Circuit affirmed, holding that the Fourth Amendment exclusionary rule is not applicable in probation revocation proceedings. The court reasoned that the exclusion of reliable evidence bearing on the probationer's rehabilitation would contribute little to deterring constitutional violations while impeding society's interest in protecting itself against convicted criminals who have abused the liberty afforded them.

The court further stated that since the aim of the police when they conduct a search is to convict the target of the search of a substantive offense, they know that any unconstitutional search on their part will be grounds for suppressing evidence at the defendant's trial. Thus, in the court's view, a sufficient deterrent to Fourth Amendment violations already exists and the application of the exclusionary rule to probation revocation hearings is unnecessary.

The court further observed that since a probationer has already been found guilty of a crime and his liberty is only "conditional," a revocation hearing is more of a resentencing than a taking of rights. United States v. Bazzano, 677 F.2d 971 (1982), 19 CLB 74.

Court of Appeals, 4th Cir. While petitioner was on state probation following his conviction for grand larceny, a search of his residence produced firearms and marijuana. At the state criminal trial, the evidence seized during the search was successfully suppressed, and the state of Virginia dropped the charges. At a subsequent probation revocation hearing, the evidence suppressed in the criminal proceedings was admitted, and his probation was revoked. The district court granted habeas corpus relief and the state appealed.

Held, reversed. The Fourth Circuit found that the exclusionary rule does not apply to probation revocation proceedings. The court further ruled that federal habeas corpus could not be used to reexamine the admissibility of evidence offered in a state probation revocation proceeding even though such evidence was excluded under the exclusionary rule from petitioner's trial or charges alleging offenses committed while he was on probation. The court noted that while Fourth Amendment claims may be raised on direct appeal, they may not normally be raised by way of habeas corpus. Grimsley v. Dodson, 696 F.2d 303 (1982), 19 CLB 379.

§ 40.10. —Procedure

Court of Appeals, 4th Cir. After probation revocation proceedings were brought against the probationer, the district court revoked probation and the probationer appealed on the ground that a letter from his program director at a Salvation Army center explaining why he had lost his job and was expelled from the center was hearsay evidence improperly admitted at the hearing.

Held, affirmed. The Fourth Circuit held that the Federal Rules of Evidence pertaining to hearsay do not apply to probation revocation hearings. The court relied on the Notes of the Advisory Committee for the Federal Rules of Evidence, which stated that the usual rules of evidence need not be applied in parole revocation hearings and that the court may consider documentary evidence, including letters that would not be admissible in a criminal trial. The court further observed that the contents of the letter in question were corroborated by the probationer's own testimony in which he admitted loss of his job and infractions of the center's rules. United States v. McCallum, 677 F.2d 1024 (1982), 219 CLB 75.

41. PRISONER PROCEEDINGS

§ 41.10. Segregated prison facilities

U.S. Supreme Court A Pennsylvania prisoner brought a civil rights action claiming that prison officials' actions in confining him to administrative segregation violated his due process rights after criminal charges based on a riot in the prison were filed against him. The district court rendered summary judgment for the prison officials. The Court of Appeals for the Third Circuit reversed, and certiorari was granted.

Held, reversed. The U.S. Supreme Court found that the prisoner's due process rights were not violated since an informal, nonadversary evidentiary review was sufficient for both the decision that an inmate represented a security threat and the decision to confine him to administrative segregation pending completion of an investigation against him. The Court observed that prison officials have broad administrative and discretionary authority over the institutions they manage, and lawfully incarcerated persons retain only a narrow range of protected liberty interests. Hewitt v. Helms, 103 S. Ct. 864 (1983), 19 CLB 477.

§ 41.70. Transfer of prisoners

U.S. Supreme Court A federal prisoner who was in the witness protection program applied to the U.S. Supreme Court for an emergency stay of his transfer to another federal facility while his appeal to the court of appeals from a denial of a preliminary injunction against the transfer was pending.

Held, application for emergency stay denied. Justice Rehnquist found that there was no indication that the officials responsible for the witness protection program would not continue to protect the federal prisoner, therefore there was insufficient evidence to overrule the district court's conclusion that the prisoner had not demonstrated the requisite irreparable injury. Beltran v. Smith, 103 S. Ct. 2 (1982), 19 CLB 261.

42. ANCILLARY PROCEEDINGS

DEPRIVATION OF CIVIL RIGHTS

§ 42.30. In general

U.S. Supreme Court Convicted state defendants brought a Civil Rights Act suit against state and local police officers seeking damages based on alleged giving of perjured testimony at their criminal trial. The district court rendered judgment for the defendants, and the Court of Appeals for the Seventh Circuit affirmed.

Held, conviction affirmed. The Supreme Court stated that the Civil Rights Act of 1871 does not authorize a convicted person to assert a damage suit against a police officer for giving perjured testimony at his criminal trial. The Court found that it would not carve out an exception to the general rule of immunity in cases of alleged perjury. Briscoe v. LaHue, 103 S. Ct. 1108 (1983), 19 CLB 475.

PART V—CONSTITUTIONAL GUARANTEES

43. ADMISSIONS AND CONFESSIONS

GROUNDS FOR EXCLUSION; GENERALLY

§ 43.00. Involuntariness and coercion

South Carolina Defendant was convicted of housebreaking. He argued on appeal that the trial court erred when it refused to submit to the jury the question of whether his post-arrest incriminating statements were voluntarily given to police.

The interrogation of defendant had been recorded; the recording disclosed that defendant was given his *Miranda* rights, acknowledged his understanding of them, and stated that he was prepared to proceed without the assistance of counsel. At no time during the ensuing interrogation did he show any reluctance in answering questions.

At trial, defendant testified in his own behalf and admitted, on cross-examination, that he had made the incriminating statements voluntarily. The trial court found that defendant's statements were freely given and refused to submit the issue of voluntariness to the jury.

Held, affirmed. The South Carolina Supreme Court ruled that the trial judge's finding of voluntariness could not be seriously challenged on the facts. A review of the record indicated "to the exclusion of all other reasonable inferences, that the Defendant's statements were . . . voluntary." As no true issue of fact was in dispute, concluded the court, there was no need to submit the question of voluntariness to the jury. Accordingly, it affirmed the conviction. State v. Linnen, 293 S.E.2d 851 (1982), 219 CLB 175.

§ 43.10. —Promises of leniency

Iowa Defendant, convicted of the robbery-murder of an elderly neighbor, argued on appeal that his confession should have been suppressed because it had been induced by an improper police interrogation.

Defendant had admitted the killing to his mother, who advised police. Defendant acceded to a police request to come to the station house for questioning; there he was advised of his rights and was interrogated for several hours, during which time he maintained his innocence. A superior officer was consulted and spoke privately with defendant, advising him that "if he [gave] a statement to police there would be a much better chance of him receiving a lesser offense than first-degree murder." Defendant thereupon admitted the crime and, subsequently, signed a transcribed confession.

Held, reversed and remanded. The Iowa Supreme Court in reviewing defendant's claim that his confession was not voluntary, observed:

> Many factors bear on the issue of voluntariness. These include the defendant's knowledge and waiver of his *Miranda* rights; the defendant's age, experience, prior record, level of education, and intelligence; the length of time defendant is detained and interrogated; whether physical punishment was used, including the deprivation of food or sleep; defendant's ability to understand the questions; the defendant's physical and emotional condition and his reaction to the interrogation; whether any deceit or improper promises were used in gaining the admissions; and any mental

weakness the defendant may possess. [Citations omitted.]

The issue of voluntariness, it continued, depends upon the "impetus" for the inculpatory statement; "If the statement is not the product of 'rational intellect and free will,' but results from a promise of help or leniency by a person in authority it is not considered voluntary and is not admissible."

Police, stated the court, can

> ordinarily tell a suspect that it is better to tell the truth. The line between admissibility and exclusion seems to be crossed, however, if the officer also tells the suspect what advantage is to be gained or is likely from making a confession. Ordinarily the officer's statements then become promises or assurances, rendering the suspect's statements involuntary.

Here, it found, the officer's statement went beyond advising defendant to tell the truth and amounted to an improper inducement to confess in hopes of leniency. Hence, the confession should not have been admitted. State v. Hodges, 326 N.W.2d 345 (1982), 19 CLB 383.

Louisiana Defendant was charged with a series of burglaries. He moved, pretrial, to suppress his confession, contending that it had been improperly induced by police who promised that his cooperation would be brought to the attention of the prosecutor.

The hearing court ruled that such a promise constituted an improper influence, rendering the confession inadmissible. The state then took an interlocutory appeal.

Held, reversed and remanded. The Louisiana Supreme Court observed that the state has the burden of proving beyond a reasonable doubt that a defendant's inculpatory statement was made "freely and voluntarily and not under the influence of fear, duress, intimidation, menaces, threats, inducements, or promises." However, it held, merely telling an accused that his cooperation in giving a statement would be brought to the attention of the district attorney does not amount to a disqualifying inducement. Therefore, it found that the hearing court had erred in ordering suppression. State v. Jackson, 414 So. 2d 310 (1982), 19 CLB 89.

§ 43.35. Absence of counsel

Court of Appeals, 7th Cir. An Illinois state prisoner petitioned for habeas corpus relief, asserting that the trial court had improperly admitted a confession that he had made after having asked to consult with an attorney.

Held, reversed and remanded. The Seventh Circuit noted that this case had been before the court for the third time pursuant to an order of the U.S. Supreme Court (451 U.S. 1013, 101 S. Ct. 3000 (1981)), and held that where defendant had confessed during a second interrogation (two days after requesting counsel during an initial interrogation and before counsel had been made available to him), the confession was not validly obtained. The court reasoned that defendant had not validly waived his *Miranda* rights and could not have done so before counsel was made available to him as requested. White v. Finkbeiner, 687 F.2d 885 (1982), 19 CLB 173.

§ 43.40. Post-indictment and post-arrest statements

Court of Appeals, 2d Cir. Defendant was convicted on a guilty plea on two counts of preparing and conspiring to prepare false documents for submission to a governmental agency. On appeal, he argued that a post-indictment statement made by him to a government informant had been improperly admitted at trial.

Held, conviction affirmed. The Second Circuit found that while ordinarily the use of an informer to elicit incriminating statements from the defendant after indictment is improper, the post-indictment investigation here focused on criminal activity distinct from the indicted crimes, and that the government's continued investigation of other crimes and obstruction of justice was proper. United States v. Pineda, 692 F.2d 284 (1982), 19 CLB 264.

§ 43.50. Fruit of an illegal arrest

U.S. Supreme Court After the petitioner was arrested on a robbery charge without a warrant or probable cause, based on an uncorroborated informant's tip, and was taken to the police station, he confessed after being given his *Miranda* warnings. The confession was admitted at trial and he was convicted and the Alabama Court of Criminal Appeals reversed, but the Alabama Supreme Court in turn reversed and reinstated the conviction. Certiorari was granted.

Held, reversed and remanded. The U.S. Supreme Court held that petitioner's confession should have been suppressed as the fruit of an

illegal arrest. The Court reasoned that a confession obtained through custodial interrogation after an illegal arrest should be excluded unless intervening events break the causal connection between the arrest and the confession so that the confession is sufficiently an act of free will to purge the primary taint. The Court observed that, here, there was no meaningful intervening event and the illegality of the arrest was not cured by the six hours' elapsed time between the arrest and the confession. Taylor v. Alabama, 102 S. Ct. 2664 (1982), 19 CLB 71.

VIOLATIONS OF *MIRANDA* STANDARDS AS GROUNDS FOR EXCLUSION

§ 43.55. General construction and operation of *Miranda*

Illinois Defendant was convicted of taking indecent liberties with a child, an offense committed, inter alia, when a person seventeen years old or older engages in deviate sexual contact with a person under the age of sixteen. The only proof of defendant's age offered at trial was the testimony of a police officer who questioned defendant three days after his arrest.

After receiving *Miranda* warnings from the officer, defendant stated that he would not discuss the charges without first consulting an attorney; however, he offered to speak about anything else. The officer proceeded to get general identifying data from defendant, including his date of birth.

On appeal, defendant contended that his rights under *Miranda* were violated by introducing his statements of his age.

Held, affirmed. The Illinois Supreme Court held that the principles of *Miranda* did not prohibit inquiry into basic identifying data concerning a defendant, even where the response may establish an element of the crime with which he is charged. People v. Dalton, 434 N.E.2d 1127 (1982), 19 CLB 82.

§ 43.90. Waiver of *Miranda* rights

§ 43.95. —Voluntary and intelligent requirement

U.S. Supreme Court Defendant, a soldier, was charged with rape in Missouri. He retained private defense counsel. After discussing the matter with his counsel and a military attorney, defendant requested a polygraph examination. His request was granted and before being examined, defendant signed a written consent document as required by Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966), and also was advised of his rights under the Uniform Code of Military Justice and the Eighth Amendment. He was further advised that he could stop answering questions at any time or speak to a lawyer before answering further. He refused such assistance. After the examination, he admitted having intercourse with the victim and was convicted of rape. The district court denied his petition for habeas corpus relief. On appeal the Eighth Circuit reversed, and the Supreme Court granted certiorari.

Held, reversed. The Supreme Court concluded that once defendant made voluntary, knowing, and intelligent waiver of his right to have counsel present at a polygraph examination, there was no requirement that the police again advise him of his rights before questioning him about the results of the polygraph. The court particularly noted that defendant had consulted with an attorney, and it was clear that he understood his rights and was aware of his power to stop the questioning at any time. Wyrick v. Fields, 103 S. Ct. 394 (1982), 19 CLB 373.

44. CONFRONTATION OF WITNESSES

§ 44.00. In general

U.S. Supreme Court After defendant was convicted in the district court of transporting an illegal alien, the Court of Appeals for the Ninth Circuit reversed on the ground that an alien witness had been deported before trial.

Held, reversed. The Supreme Court held that a defendant seeking to show denial of due process or denial of the Sixth Amendment right of confrontation because of the deportation of an alien witness must make some plausible explanation of the assistance that he would have received from the testimony of the deported witness. The Court further observed that the deportation of an illegal alien witness is justified upon a good-faith determination that the witness possesses no evidence favorable to the defendant. The Court thus concluded that sanctions will be warranted for deportation of an alien witness only if there is a reasonable likelihood that the testimony could have affected the judgment of the trier of facts. United States v. Valenzuela-Bernal, 102 S. Ct. 3440 (1982), 19 CLB 73.

Court of Appeals, 2d Cir. Defendant was convicted of various federal drug offenses. Defendant asserted as error the admission of the grand jury testimony of a witness who was murdered during the course of his first trial because such testimony was inadmissible hearsay, the use of which violated the confrontation clause of the Sixth Amendment.

Held, remanded. The Second Circuit ruled that an evidentiary hearing was required to determine if defendant was involved in the murder of a prosecution witness. The court further held that if defendant was found to have been involved in the murder, then the witness's grand jury testimony was admissible, reasoning that if defendant was involved in the murder, he thereby waived his rights under the confrontation clause. United States v. Mastrangelo, 693 F.2d 269 (1982), 19 CLB 263.

§ 44.05. —Interpretations by state courts

Louisiana Defendant, convicted of murder, argued that his constitutional right of confrontation was violated by the trial court's refusal to allow him to cross-examine a prosecution witness's juvenile record. Both defendant and the witness, Johnson, had been charged initially with the murder of a cab driver. Johnson gave police a statement exculpating himself and incriminating defendant; he was permitted to plead guilty to a reduced charge in exchange for his trial testimony against defendant.

At trial, defendant sought to cross-examine Johnson about the latter's juvenile delinquency adjudications, which included charges of larceny, burglary, battery, and aggravated assault; the trial court refused to permit the inquiry on the ground that such juvenile records are confidential. Defendant himself testified at trial and asserted that Johnson was the sole killer.

Held, reversed and remanded. The Louisiana Supreme Court said that the opportunity to cross-examine Johnson fully was of particular importance under the circumstances present in this case, since he was arguably a participant in the crime. It noted that, moreover, while some witnesses saw defendant carrying the murder weapon before the crime was committed, others saw it in Johnson's possession afterwards; only Johnson refuted defendant's testimony that it was Johnson, not he, who committed the crime.

Noting Johnson's obvious motive to lie, other inconsistencies in his testimony and the fact that his juvenile delinquency adjudications were probative both on the issues of his past violent behavior and veracity, the court found that defendant's right to confrontation outweighed the state's interest in preserving the confidentiality of Johnson's juvenile records. State v. Hillard, 421 So. 2d 220 (1982), 19 CLB 388.

§ 44.35. Use of witness's prior testimony

Court of Appeals, 11th Cir. After the defendants were convicted in the district court of conspiring to import marijuana, they appealed on the ground that they were not able to cross-examine a prosecution witness at a second trial since the transcript of the witness's testimony at the first trial was admitted.

Held, convictions affirmed. The Eleventh Circuit stated that the prosecution witness's first trial testimony was properly admitted at the second trial when the witness refused to testify, notwithstanding that there was no cross-examination at the first trial concerning violations of a sequestration order. The court found that the admission of the prior testimony did not violate the confrontation clause where the violation of the sequestration order did not relate to the substance of the witness's testimony against the defendant and the only effect of cross-examination would have been to impeach the witness's credibility, which was adequately attacked at the first trial. United States v. Monaco, 702 F.2d 860 (1983), 19 CLB 479.

§ 44.40. Harmless error

Wisconsin Defendant, convicted of sexual assault, argued on appeal that there should be a reversal because statements obtained from him in violation of his constitutional rights were admitted into evidence at trial.

On appeal, the state conceded that police violated his rights by continuing a post-arrest interrogation after defendant had requested counsel; however, it contended that any error committed by receiving the statements into evidence was harmless beyond a reasonable doubt because the statements were merely duplications of other evidence.

The statements in dispute consisted of defendant's admission that he forced the victim into the basement of her home and demanded that she remove her clothing, but did not recall attempting to have sexual intercourse with her because he was in an intoxicated state at the time of the incident. Other witnesses and evidence placed defendant at the scene and the

victim's testimony that defendant attempted to have sex was uncontradicted.

Held, reversed and remanded for new trial. The Wisconsin Supreme Court found defendant's statements did more than duplicate other evidence because defendant's "selective memory" concerning the incident was not credible; the jury, it continued, would have been influenced by admission of his statements. Accordingly, the court concluded that the error was not harmless. State v. Billings, 329 N.W.2d 192 (1983), 19 CLB 487.

45. RIGHT TO COUNSEL

SCOPE AND EXTENT OF RIGHT GENERALLY

§ 45.20. Right to continuance of trial to obtain new counsel

Court of Appeals, 5th Cir. Defendant was convicted of murdering a uniformed police officer who, having caught defendant with loot from a bar robbery that he had just committed, was attempting to apprehend him. His state conviction and death sentence were confirmed on direct appeal. Defendant exhausted his state habeas corpus remedies, and his application for the writ was denied in the federal district court, therefore he appealed.

Held, affirmed, remanded on another point of law. The Fifth Circuit ruled that the trial court did not deny the state prisoner effective assistance of counsel by refusing his request to dismiss his court-appointed counsel and for a continuance to permit his representation by new counsel. The court observed that the request was made two days before trial and the new counsel knew nothing about the case and was just commencing a lengthy trial in another state. The court further noted that the rights to counsel of one's own choosing is not an absolute right and may not be used for purposes of delay, especially where, as here, petitioner asserted nothing more than a sudden loss of confidence in his appointed counsel and a desire for a new one specializing in "death cases." Bass v. Estelle, 696 F.2d 1154 (1983), 19 CLB 375.

Illinois Defendant, convicted of delivering cocaine, argued on appeal that his Sixth Amendment and state constitutional rights were violated by denial of his motion for a continuance to obtain trial counsel.

Over eighteen months elapsed between the filing of the complaint and commencement of time, during which period defendant was free on bail. At least one year of the period was attributable to defendant and most of the numerous continuances he requested related to his retention of counsel.

On January 7, a date scheduled for trial some weeks earlier, defendant appeared before the court and claimed to have retained new counsel, who was then engaged in another trial. The court granted defendant's request for a one-week adjournment, despite the prosecutor's objection that he was ready to proceed, but cautioned defendant that the case would go to trial on January 16 with or without defendant's attorney.

On January 16, defendant stated that his attorney, who had never filed a notice of appearance, had "withdrawn" from the case. The court ordered the case to go forward and defendant participated pro se in jury selection.

After the jury was empaneled, defendant requested a further continuance to obtain counsel. The court refused and the trial proceeded, with the court assisting defendant in the examination of witnesses and as to general procedural matters.

Following his conviction, defendant retained appellate counsel and, on appeal, the intermediate appellate court reversed and held that defendant had not knowingly and intelligently waived his right to counsel.

Held, reversed; conviction reinstated. The Illinois Supreme Court stated that where a defendant who is financially able to engage counsel has been instructed to do so within a certain reasonable time, but he fails to do so and does not show reasonable cause why he was unable to secure representation, the court may treat such a failure as a waiver of the right to counsel and require him to proceed.

Here, the court found, the trial judge reasonably concluded that defendant, who made no claim of indigency, was deliberately seeking to postpone the trial indefinitely and frustrate the administration of justice. "Judicial patience need not be infinite," the court said, in deciding that the trial court had not abused its discretion in ordering defendant to trial without counsel. People v. Williams, 440 N.E.2d 843 (1982), 19 CLB 276.

§ 45.25. Waiver

§ 45.30. —Right to defend pro se

New York Defendant, convicted of larceny and related crimes, argued on appeal that the

trial court erroneously denied his request for "standby counsel" to assist him in representing himself at trial. Defendant had moved to proceed pro se, but requested that the court appoint an attorney to act in an advisory capacity; after a lengthy hearing into defendant's ability to represent himself, the court permitted pro se representation but refused to assign standby counsel.

Held, affirmed. The court of appeals found that there was no constitutional right to the "hybrid" form of representation requested by defendant; an accused's Sixth Amendment rights provide for either representation by counsel or pro se representation, but not both, it noted. While the appointment of standby counsel to assist a pro se defendant has received judicial approval, such an appointment is within the trial court's discretion and not a matter of right. Here, the trial court con-ducted an extensive inquiry, during which:

> Defendant repeatedly asserted his desire to appear on his own behalf and manifested his appreciation of the attendant risks as well as his familiarity with legal principles and courtroom procedures. The record demonstrates that defendant's decision to proceed *pro se* without standby counsel was made knowingly and intelligently.

People v. Mirenda, 442 N.E.2d 49 (1982), 19 CLB 389.

TYPE OR STAGE OF PROCEEDING

§ 45.60. Sentencing

Oregon Defendant had entered a plea of "no contest" to a charge of sexual abuse. A presentence investigation was ordered and defendant was directed to appear before the probation department for various interviews. Defendant's attorney was not allowed at the interviews; defendant then moved for an order permitting his attorney to be present. The sentencing court denied his motion and defendant brought a mandamus proceeding against the court.

Held, peremptory writ of mandamus issued. The Oregon Supreme Court ruled that pursuant to the Sixth Amendment guarantee of the right to counsel, defendant's attorney could not be barred from attending the pre-sentence interviews. Sentencing, it noted, is a critical stage of a criminal prosecution at which a defendant is entitled to counsel. Functionally, the presentence investigation is part of the sentencing proceeding and, accordingly, the assistance of counsel cannot be denied. State *ex rel.* Russell v. Jones, 647 P.2d 904 (1982), 19 CLB 176.

ADEQUACY AND EFFECTIVENESS OF COUNSEL

§ 45.110. Ineffectiveness

Connecticut Defendant, convicted of attempted assault, contended on appeal that his Sixth Amendment right to the effective assistance of counsel had been violated because his attorney had not pursued an insanity defense.

Held, conviction affirmed. The Connecticut Supreme Court suggested that a claim of ineffective assistance of counsel is more properly presented on a petition for a new trial or for a writ of habeas corpus rather than on direct appeal, because the evidentiary hearing available in the collateral proceeding

> provides the trial court with the evidence which is often necessary to evaluate the competency of the defense and the harmfulness of any incompetency. "The defendant, his attorney, and the prosecutor have an opportunity to testify at such a hearing as to matters which do not appear of record at the trial, such as . . . whether, for tactical reasons, objection was not made to certain adverse testimony, just how much information the defense attorney received from his client about statements made to others, and other such relevant matters." [Citation omitted.]

Noting that, because of the inadequacy of the record, defendant had not met his burden of showing that counsel's performance fell below the "range of competence displayed by lawyers with ordinary training and skill in the criminal law." The court, in affirming defendant's conviction, however, noted its decision did not preclude defendant from pursuing his claim in a collateral proceeding. State v. Chairamonte, 454 A.2d 272 (1983), 19 CLB 491.

§ 45.120. —Failure to assert available defense

Court of Appeals, 3d Cir. On appeal from the denial of a petition for habeas corpus, defendant, who had been convicted of narcotics violations in state court, argued that he had been denied effective assistance of counsel where his attorney had failed to compare his voice exemplar to the government's intercepted recording.

Held, reversed and remanded. The Third Circuit concluded that defendant had been denied effective assistance of counsel by defense's failure to make the comparison of the two tape recordings where the tape recording of the intercepted telephone conversation was the only evidence introduced against defendant. The court reached this conclusion even though trial counsel may have decided as a matter of strategy not to use the exemplar at trial despite the testimony of an expert that spectrographic analysis indicated defendant was a speaker in the incriminating telephone conversation. United States v. Baynes, 687 F.2d 659 (1982), 19 CLB 172.

Court of Appeals, 5th Cir. After having been convicted in a Mississippi state court of murder, defendant petitioned for federal habeas corpus relief on the ground that he had been denied effective assistance of counsel due to his lawyer's failure to properly investigate his defense. His petition was denied by the district court.

Held, affirmed. The Fifth Circuit held that a defendant seeking to establish a Sixth Amendment denial of effective assistance of counsel must show both failure to investigate adequately as well as actual prejudice arising from the failure. The court explained that it was not enough for defendant to show that the investigation of a possible character witness would have turned up admissible evidence; he must also establish that knowledge of the uninvestigated evidence would have altered his counsel's tactical decisions at trial. The court further found that defense counsel's tactical decision that good character testimony would be inconsistent with the defense of mental disturbance did not constitute ineffective assistance. Gray v. Lucas, 677 F.2d 1086 (1982), 19 CLB 76.

CONFLICT OF INTEREST

§ 45.145. In general

Nebraska Defendant, convicted of murder, argued on appeal that there should be a reversal because of a conflict of interest on the part of his trial counsel. At trial, the state called two witnesses who were also represented by defense counsel. Defendant was informed of the multiple representations but made no objection. Both witnesses testified and were cross-examined by defense counsel; neither gave testimony that was harmful to defendant.

Held, affirmed. The Nebraska Supreme Court stated that the mere possibility of a conflict of interest by an accused's attorney does not constitute a violation of the accused's Sixth Amendment right to the effective assistance of counsel. To establish such a violation, the court continued, a defendant who raised no objection at trial must demonstrate both that (1) his attorney also represented other clients whose interests actually conflicted with his own and (2) the multiple representation had an adverse effect on his attorney's performance. Here, found the court, the record disclosed no actual conflict of interest. State v. Pope, 318 N.W.2d 883 (1982), 19 CLB 87.

§ 45.150. Representation of co-defendants

Court of Appeals, 4th Cir. Defendants were convicted of conspiracy to import and possess narcotics. On appeal, they claimed their rights were violated because they were represented at trial by the same attorney. They contended that Federal Rule of Criminal Procedure 44(c) requires the court to "inquire with respect to such joint representation and . . . personally advise each defendant of his right to effective assistance of counsel, including separate representation."

Held, affirmed. The Fourth Circuit held that the mere failure of the district court to inquire or advise as to the defendant's joint representation by the same attorney did not, per se, require reversal of the convictions. The court explained that the claimed "guilt by association" arising from the joint representation did not establish prejudice warranting reversal. The court further found that it was unnecessary to decide whether the substance of a conversation one of the defendants had with a government agent and introduced into evidence created prejudice as a result of the joint representation since the conversation was admitted without objection and no motion was made to strike it. United States v. Arias, 678 F.2d 1202 (1982), 19 CLB 77.

§ 45.160. Previous representation of prosecution witness

Nebraska The defendant, convicted of murder, argued on appeal that there should be a reversal because of a conflict of interest on the part of his trial counsel. At trial, the state called two witnesses who were also represented by

defense counsel. Defendant was informed of the multiple representations but made no objection. Both witnesses testified and were cross-examined by defense counsel; neither gave testimony that was harmful to the defendant.

On appeal, the Nebraska Supreme Court affirmed the conviction, stating that the mere possibility of a conflict of interest by an accused's attorney does not constitute a violation of the accused's Sixth Amendment right to the effective assistance of counsel. To establish such a violation, the court continued, a defendant who raised no objection at trial must demonstrate both that (1) his attorney also represented other clients whose interests actually conflicted with his own and (2) the multiple representation had an adverse effect on his attorney's performance.

Here, found the court, the record disclosed no actual conflict of interest. State v. Pope, 318 N.W.2d 883 (1982), 19 CLB 87.

RIGHT TO CONFER WITH COUNSEL

§ 45.165. In general

Georgia Defendant, convicted of murder, argued on appeal that there should be a reversal because the arresting officer testified at trial that, while being booked, defendant had requested to speak with his attorney and was given use of a telephone for that purpose.

Held, conviction affirmed. The Georgia Supreme Court stated that "this testimony did not focus on the defendant's silence or suggest that the defendant had asserted his right to remain silent. The testimony simply related, in the course of a lengthy narrative, that the defendant requested an attorney; it did not purport to be evidence of the defendant's guilt or to be directed toward undermining any of his defenses." Accordingly, the court concluded, defendant's rights were not prejudiced by the officer's testimony. Duck v. State, 300 S.E.2d 121 (1983), 19 CLB 487.

South Carolina Defendant, convicted of murder, argued on appeal that his right to counsel was violated when the trial judge prohibited him from consulting with his attorney during a fifteen-minute recess between his direct testimony and cross-examination.

Held, conviction affirmed. The South Carolina Supreme Court found that the trial judge's denial of the brief consultation did not amount to a denial of the defendant's rights. It reasoned:

> Normally, counsel is not permitted to confer with his defendant client between direct examination and cross-examination. Should counsel for a defendant, after direct examination, request the judge to declare a recess so that he might talk with his client before cross-examination begins, the judge would and should unhesitatingly deny the request.

Moreover, even if the trial judge's ruling could be considered a violation of defendant's right to counsel, defendant had not demonstrated that he was prejudiced as a result; thus, implied the court, any possible error was harmless and not grounds for reversal. State v. Perry, 299 S.E.2d 324 (1983), 19 CLB 486.

46. CRUEL AND UNUSUAL PUNISHMENT

§ 46.05. Death penalty

§ 46.10. —Statutory requirements

U.S. Supreme Court A Georgia prisoner was denied federal habeas corpus relief by the district court, but the Court of Appeals for the Fifth Circuit reversed and remanded to the extent that the district court left standing his death sentence since one of the aggravating circumstances found by the jury—that the murder was committed by a person who has a substantial history of serious assaultive criminal convictions—was found invalid.

Held, question certified to the Georgia Supreme Court. The U.S. Supreme Court noted that the Georgia Supreme Court had never explained the rationale for its position that the death sentence is not impaired by the invalidity of statutory aggravating circumstances found by the jury. The Supreme Court then certified to the Georgia Supreme Court a question seeking an explanation of the state law premises supporting the conclusion that if two or more statutory aggravating circumstances are found by the jury, the failure of one circumstance does not taint the proceeding. Zant v. Stephens, 102 S. Ct. 1856 (1982), 19 CLB 69.

U.S. Supreme Court Habeas corpus relief was denied to an Alabama state prisoner in a capital case by the district court, but the Court of Appeals for the Fifth Circuit reversed on the ground that failure of the trial court to give a lesser included offense instruction required reversal of the death sentence.

Held, reversed. The Supreme Court held that where defendant testified in the murder

trial that, if necessary, he was always prepared to kill, and defendant admitted to shooting his victim in the back in the course of the armed robbery, defendant was not prejudiced in any way by the fact that, under an Alabama statute thereafter found to be unconstitutional, the jury was required to convict defendant of the capital offense charged or return a verdict of not guilty and was not allowed to consider any lesser included offenses. The Court reasoned that due process requires only that the lesser included offense instruction be given when the evidence warrants such instruction. The Alabama rule that the lesser included offense instruction should be given if there is any reasonable theory from the evidence which would support the position did not offend federal constitutional standards. Hopper v. Evans, 102 S. Ct. 2049 (1982), 19 CLB 69.

U.S. Supreme Court Defendant and a co-defendant, at a jury trial in a Florida court, were convicted of first-degree murder and robbery, and were sentenced to death. The Florida Supreme Court affirmed. The court found that under Florida law, if the accused was present aiding and abetting the commission or attempt of one of the violent felonies listed in the first-degree murder statute, he is equally guilty with the actual perpetrator of the underlying felony of first-degree murder. Certiorari was granted to determine whether death is a valid penalty under the Eighth and Fourteenth Amendments for one who neither took life, attempted to take life, nor intended to take life.

Held, reversed and remanded. The Supreme Court held that the Eighth Amendment does not permit the imposition of the death penalty on a defendant who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that killing take place or that force will be employed. The Court thus ruled that the identical treatment of a robber and his accomplice, and the attribution to the accomplice of the culpability of those who killed victims was impermissible under the Eighth Amendment. The Court reasoned that in determining the validity of capital punishment of an accomplice's conduct, focus must be made on his individual culpability and not that of those who committed the robbery and shot the victims. Enmund v. Florida, 102 S. Ct. 3368 (1982), 19 CLB 72.

Court of Appeals, 9th Cir. Defendant, a California state prisoner, who was sentenced to death for murder, appealed from the federal district court's denial of his habeas corpus petition.

Held, vacated and remanded to allow the California Supreme Court to undertake a proportionality review of the application of the death penalty in this case. The Ninth Circuit declared that the California death penalty statute is constitutional since it establishes factors to guide the jury's discretion and allows for consideration of aggravating and mitigating circumstances. The court explained that while irregular or selective application of the death penalty is to be avoided, consideration of non-statutory mitigating or aggravating circumstances is not objectionable as long as at least one statutory circumstance is found before the death penalty is imposed. The court thus concluded that the California statute did not violate the Eighth and Fourteenth Amendments on the theory that it placed no limit on the prosecutor's introduction of evidence of aggravating factors. Harris v. Pulley, 692 F.2d 1189 (1982), 19 CLB 264.

47. DOUBLE JEOPARDY

§ 47.20. Mistrials

U.S. Supreme Court Defendant was tried for theft in an Oregon state court. The state's expert witness testified as to the value and identity of the stolen property. On cross-examination, the witness acknowledged that he had once filed an unrelated criminal complaint against defendant, but explained no action had been taken on his complaint. On redirect examination, the trial judge sustained objections to the prosecutor's questions about why the witness had filed a complaint against defendant. After eliciting from the witness that he had never done business with defendant, the prosecutor asked: "Is that because he is a crook?" The trial judge then granted defendant's motion for a mistrial. On retrial, the court rejected defendant's contention that the double jeopardy clause constitutionally barred further prosecution finding that "it was not the intention of the prosecutor in this case to cause a mistrial." Defendant was convicted, but the Oregon Court of Appeals reversed sustaining the double jeopardy claim because the prosecutor's misconduct amounted to "overreaching." Certiorari was granted.

Held, reversed and remanded. The Supreme Court held that retrial was not barred by the double jeopardy clause since the prosecutor's remarks were not intended to provoke a mis-

trial. The Court explained that when a defendant asks for a mistrial, retrial is barred only when there is "manifest necessity" triggered by misconduct by the prosecutor that is so clearly harassment or overreaching so as to demonstrate intent to subvert the protection afforded by the double jeopardy clause and "goad" the defendant into seeking a mistrial. Oregon v. Kennedy, 102 S. Ct. 2083 (1982), 19 CLB 70.

U.S. Supreme Court Defendant was convicted of rape and murder at a jury trial based on the weight of the evidence. Pursuant to the jury's recommendation, the judge sentenced defendant to death. On appeal, the Florida Supreme Court reversed. On remand, the trial court dismissed the indictment on double jeopardy principles. The Florida District Court of Appeal reversed, and the state supreme court affirmed. Certiorari was granted to decide whether the double jeopardy clause bars retrial after a state appellate court sets aside a conviction on the ground that the verdict was against "the weight of the evidence."

Held, affirmed. The Supreme Court held that reversal because of the weight of the evidence, rather than on the sufficiency of the evidence, does not preclude retrial on double jeopardy grounds. The Court observed that reversal based on the weight of the evidence does not mean that acquittal was the only proper verdict; rather, the appellate court sits as a "thirteenth juror" and disagrees with the jury's resolution of the conflicting testimony. The Court compared a reversal based on the evidence's weight to a mistrial due to a deadlocked jury, where retrial is permitted as a matter of course. Tibbs v. Florida, 102 S. Ct. 2211 (1982), 19 CLB 70.

Court of Appeals, 5th Cir. After the defendant was convicted in the district court on two counts of a three-count indictment charging him with conspiracy to receive and utter counterfeit money, he appealed on double jeopardy grounds.

Held, conviction affirmed. The Fifth Circuit stated that the defendant's failure to object to trying a case before a second jury, and requesting that it be tried before the first jury, constituted waiver of the claim that he was placed in double jeopardy by failure to proceed before the original jury on the original indictment. The defendant, who was arrested on a one-count indictment, which was subsequently superseded by a three-count indictment, stated that he was opposed to being prosecuted on the new counts before the previously selected jury. The court thus concluded that after he was convicted under two counts of the superseding indictment by the newly impaneled jury, he was not placed in double jeopardy by failure to proceed before the original jury on the original indictment. United States v. Milhim, 702 F.2d 522 (1983), 19 CLB 479.

§ 47.25. —Reason for grant

Court of Appeals, 8th Cir. After his tax evasion trial ended in a declaration of mistrial because of the conclusion that the government's statistically based projections of income received by defendant's business should not have been admitted into evidence, he appealed from an order denying his motion to dismiss the indictment.

Held, affirmed. The Eighth Circuit held that the double jeopardy clause did not bar a new trial since the government's introduction of statistical income projections at the original trial was not intentional prosecutory misconduct or gross negligence. The court observed that a retrial may only be barred after a mistrial is declared upon the defendant's motion when the government conduct giving rise to the motion was intended to provoke the defendant into moving for a mistrial. United States v. Civella, 688 F.2d 575 (1982), 19 CLB 168.

§ 47.45. Separate and distinct offenses

U.S. Supreme Court Defendant, as the result of a robbery in which he used a revolver, was convicted in a Missouri state court of both first-degree robbery and armed criminal action, and was sentenced to concurrent prison terms of ten years for robbery and fifteen years for armed criminal action. The Missouri Court of Appeals reversed the conviction and sentence on the ground that defendant's sentence for both robbery and armed criminal action violated the protection against multiple punishments for the same offense provided by the double jeopardy clause of the Fifth Amendment which was made applicable here by the Fourteenth Amendment. The court construed the robbery and armed criminal action statutes as defining the "same offense" under the test announced in Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180 (1932), i.e., where the same act or transaction constitutes a violation of two distinct statutes, the test for determining whether there are two offenses or only one is whether each statute requires proof of a fact which the other does not.

Held, vacated and remanded. The Supreme Court found that defendant's conviction and

sentence for both armed criminal action and first-degree robbery in a single trial did not violate the double jeopardy clause. The court concluded that where a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the same conduct under the *Blockburger* test, a court's task of statutory construction is at an end and the trial court may impose cumulative punishment under such statutes in a single trial. Missouri v. Hunter, 103 S. Ct. 673 (1983), 19 CLB 374.

Illinois Defendant was convicted of burglary for breaking into a day-care center located in a building owned by the county housing authority; the day-care center itself was leased to and operated by a community group. At trial, an official of the housing authority testified that defendant's entry into the premises was unauthorized; defendant's conviction was reversed on appeal on the ground that the housing authority had no possessory interest in the burglarized portion of the premises.

Following the reversal, defendant was reindicted for the burglary of the same premises, with the second indictment alleging that the premises were under the control of the day-care center. Defendant moved to dismiss the second indictment, asserting, inter alia, that retrial was barred by double jeopardy principles. The motion was granted and the dismissal affirmed by the intermediate court.

Held, reversed and remanded for trial. The Illinois Supreme Court stated that constitutional prohibitions against double jeopardy would prevent a retrial for the same offense where reversal of the initial conviction was based on insufficiency of the evidence; "the prosecutor is not afforded a second opportunity to supply evidence that he . . . failed to produce at the first trial on the same charge," it continued.

Here, both prosecutions of defendant were based on the same conduct but did not involve the same offense, the court found, reasoning that burglary of premises controlled by the housing authority was a separate and distinct offense from burglary of premises under the control of the day-care center. People v. Holloway, 442 N.E.2d 191 (1982), 19 CLB 387.

§ 47.50. —Same transaction

Court of Appeals, 6th Cir. Defendant pled guilty to two counts under the Federal Bank Robbery Act, 18 U.S.C §§ 2113(d) and 2113(e). Defendant was sentenced to fifteen years under Section 2113(d) for putting lives in jeopardy during the bank robbery, and to twenty-five years under Section 2113(e) for kidnapping in the commission of the bank robbery. The sentences ran consecutively. Defendant contended that the sentences for the two offenses merge; however, the government claimed that the continuation of the kidnapping after the completion of the bank robbery was a separate offense under Section 2113(e).

Held, vacated and remanded. The Sixth Circuit held that continuation of a kidnapping after completion of a federal bank robbery was not an offense separate from putting lives in jeopardy during a kidnapping. The court reasoned that the kidnapping of the bank officer and his family was part of the robbery scheme from the beginning and continued through the completion of the robbery and defendant's temporary escape thereafter. The court thus rejected the pyramiding of penalties under the Bank Robbery Statute where the offenses arose from the same transaction. United States v. Moore, 688 F.2d 433 (1982), 19 CLB 168.

Court of Appeals, 9th Cir. Defendant was initially convicted of the unlawful sale of heroin, and was sentenced to a fifteen-year term of imprisonment as a felon. At the time he committed that offense he had been released on his own recognizance, after having been charged with an earlier crime. Following his sentencing on the heroin charge, he was again indicted, this time under a statute proscribing commission of a felony while released on recognizance. He was awaiting trial on that indictment when he sought habeas corpus relief based on double jeopardy. This was denied by the district court; consequently defendant appealed.

Held, reversed. The Ninth Circuit found that the state statute violated the prohibition against double jeopardy since an element of the conviction required proof of the underlying felony. The court observed that while legislatures are free to define such offenses in multiple statutes, where the same transaction constitutes a violation of two distinct statutory provisions requiring the same proof, double jeopardy prevents prosecutors from seeking to secure punishment under both statutes. Dixon v. Dupnik, 688 F.2d 682 (1982), 19 CLB 171.

48. DUE PROCESS

§ 48.00. In general

U.S. Supreme Court Defendant pled not guilty to misdemeanor charges arising from an

incident involving assault on a federal officer, and requested a jury trial after initially expressing an interest in plea bargaining. While the misdemeanor charge was still pending, defendant was indicted and convicted in federal district court on a felony charge arising out of the same incident as the misdemeanor charges. Defendant moved to set aside the verdict based on prosecutory vindictiveness, contending that the felony indictment gave rise to an impermissible appearance of retaliation. The district court denied the motion, and on appeal the Fourth Circuit reversed.

Held, reversed and remanded. A presumption of prosecutory vindictiveness was not warranted in this case, and absent such a presumption no due process violation was established. A prosecutor should remain free before trial to exercise his discretion to determine the societal interest in the prosecution. The initial charges filed by a prosecutor may not reflect the extent to which an individual is legitimately subject to prosecution. United States v. Goodwin, 102 S. Ct. 2485 (1982), 19 CLB 68.

Court of Appeals, 2d Cir. Following the conviction of several congressmen and a senator resulting from the government's Abscam investigation, defendants appealed on the ground that their due process rights had been violated.

The Second Circuit affirmed the convictions, holding that the government's involvement in the Abscam operation was not so excessive as to violate due process. The court further found that the district court's finding at a due process hearing that the defendant congressmen were not "playacting" when they accepted bribes was not clearly erroneous. The court reasoned that the "coaching" of defendants by a government agent during the investigation was not outrageously coercive since it was the congressmen themselves who set the ground rules under which the bribes were offered. United States v. Myers, 692 F.2d 823 (1982), 19 CLB 266.

Court of Appeals, 5th Cir. Defendant petitioned for removal of a state court prosecution for perjury on the ground that the Texas state court had denied him due process by failing to provide him with an "examining trial" prior to indictment, and he appealed from the dismissal of the petition.

Held, affirmed. The Fifth Circuit held that no federal law guarantees a defendant the right to an "examining trial" or probable cause hearing prior to indictment and thus defendant was not entitled to removal of the state prosecution on the ground that the state violated his civil rights by selectively providing examining trials on the basis of race. The court observed that since failure under Texas law to grant an examining trial prior to the return of the indictment in no way affects its validity, the federal courts lacked jurisdiction in the absence of evidence that the federal civil rights statute was violated. Texas v. Reimer, 678 F.2d 1232 (1982), 19 CLB 77.

§ 48.05. —Drug violations

Louisiana Defendant moved to quash an information charging him with distribution of marijuana, asserting that his ability to effectively defend himself had been impaired by the passage of thirteen months between the date of the offense and date of his arrest; specifically, he claimed that the delay made it impossible to establish an alibi defense.

At a hearing before the trial court, the state contended that an immediate arrest of defendant would have jeopardized a continuing undercover investigation. Defendant's motion was denied by the trial court and defendant pled guilty to the charges, reserving his right to appeal on the issue of prearrest delay.

Held, conviction affirmed. The Louisiana Supreme Court stated that the state's interest in protecting "an ongoing undercover operation is a legitimate excuse for prearrest delay." Finding that the prejudice asserted by defendant was not sufficient to outweigh the justification for the delay, the court concluded, on balance, that defendant was not entitled to a dismissal of the charges. State v. Jenkins, 419 So. 2d 463 (1982), 19 CLB 268.

49. EQUAL PROTECTION

§ 49.00. In general

Court of Appeals, 2d Cir. After the district court dismissed the Connecticut prisoner's petition for a writ of habeas corpus, claiming a denial of equal protection relating to good-time credits, he appealed.

Held, affirmed. The Second Circuit ruled that the state statute, which increased the good-time credit only for inmates sentenced after October 1, 1976, did not violate equal protection by discriminating against prisoners sentenced prior to that date since it was rational for the Connecticut legislature to avoid a retroactive legislative modification of judicial sen-

tences which had taken into account existing systems of computing good time. The court commented that the fact that retroactivity may be permissible under other circumstances does not preclude the legislature from denying it where a rational basis exists for such action. Frazier v. Manson, 703 F.2d 30 (1983), 19 CLB 481.

§ 49.10. —Drug violations

Georgia Defendant, charged with trafficking in cocaine, moved to quash the indictment on the ground, inter alia, that the applicable statute violated constitutional equal protection and due process guarantees. The statute in issue provided that "any person who knowingly sells, manufactures, delivers, or brings into this State, or who is knowingly in actual possession of 28 grams or more of cocaine or any mixture containing cocaine . . . shall be guilty of the felony of 'Trafficking in Cocaine.'"

Defendant argued that the classification scheme aggregating the total amount of cocaine and noncontraband substance without regard to the actual amount of pure cocaine was not rationally related to the state's purpose of combatting the illicit drug trade. Punishment for trafficking in cocaine, he asserted, could only be constitutionally imposed if based upon the amount of pure cocaine, not the total mixture. The trial judge denied defendant's motion.

Held, interlocutory appeal affirmed. The Georgia Supreme Court rejected defendant's contention. The high court applied the "rational relationship" test, "If the classification scheme has a rational relationship to a legitimate state objective, the court will uphold it. Under this test it is not necessary that the scheme selected be the 'best' one available." Under the test, continued the court, the analysis was limited to identifying the legislature's objectives in enacting a particular statute and ensuring that the means chosen are rationally related to the promotion of those objectives; the court's concern, it explained, was not whether the statute was abstractly fair or could produce inequitable results. Here, the legislature intended to restrict cocaine trafficking by imposing more severe penalties on persons distributing the substance and mandating greater punishment for the possession of greater quantities of cocaine in pure or mixed form. Since pure cocaine is rarely encountered, it was reasonable for the legislature to deal with it as it is actually marketed, i.e., mixed with other substances. Lavelle v. State, 297 S.E.2d 234 (1982), 19 CLB 391.

51. FREEDOM OF THE PRESS

§ 51.00. In general

U.S. Supreme Court A judge in an Arizona murder trial where there were connections with organized crime and extensive publicity which frightened the jurors, ordered court personnel, counsel, witnesses, and jurors not to speak directly with the press. The judge appointed a court employee as "liaison with the media" to provide a "unified and singular source for the media concerning these proceedings." In addition, the judge ordered that all drawings of jurors that are to be broadcast on television be reviewed by the court before being broadcast.

Held, application for stay of orders of trial court denied. Justice Rehnquist found that the mere potential for confusion of unregulated communication between the trial participants and the press was enough to justify the court order, and that there was no restriction on reporting of the proceedings in open court. Justice Rehnquist further ruled that although it was not clear why the trial judge required clearance before sketches of jurors could be shown on television since no such requirement was imposed for sketches to be reproduced in newspapers, stay of the order was not warranted. KPNX Broadcasting Co. v. Arizona Superior Court, 103 S. Ct. 584 (1982), 19 CLB 373.

U.S. Supreme Court After a newspaper challenged an order of a Massachusetts trial judge closing a criminal trial involving a child who was the victim of a sex offense, the Supreme Court vacated and remanded. On remand, the Supreme Judicial Court of Massachusetts held that the statute that the trial judge relied upon was constitutional.

Held, judgment reversed. The Court held that the state had failed to show that the exclusion of the press was necessitated by a compelling governmental interest or that the statute was narrowly tailored to serve that interest. The Court reasoned that the statute cannot be justified on the basis of either the state's interest in protecting minor victims of sex crimes from further trauma and embarrassment or in encouraging victims to come forward and testify in a truthful and credible manner. Globe Newspaper Co. v. Superior Court, 102 S. Ct. 2613 (1982), 19 CLB 69.

§ 51.05. Applicability to "obscenity"

U.S. Supreme Court A New York statute prohibits persons from knowingly promoting a sexual performance by a child under the age of sixteen by distributing material depicting such a performance. The statute defines "sexual performance" as any performance that includes sexual conduct by such a child, and "sexual conduct" is in turn defined as actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sadomasochistic abuse, or lewd exhibition of the genitals. Defendant bookstore proprietor was convicted under the statute for selling films depicting young boys masturbating, and the Appellate Division affirmed. On appeal, the New York Court of Appeals reversed and held that the statute violated the First Amendment as being both underinclusive and overbroad. Certiorari was granted.

Held, reversed and remanded. The Supreme Court held that child pornography is not entitled to First Amendment protection provided that the conduct to be prohibited is adequately defined by applicable state law. Applying this test to the New York statute, the Court found that it was not constitutionally underinclusive or overbroad since it listed the forbidden acts to be depicted with sufficient precision. New York v. Ferber, 102 S. Ct. 3348 (1982), 19 CLB 73.

53. FREEDOM OF SPEECH AND EXPRESSION

§ 53.00. In general

Tennessee Defendant was charged under a statute which imposed criminal penalties for distributing anonymous written statements concerning candidates for public office. His motion to dismiss the indictment on First Amendment grounds was granted, with the trial court holding that the statute constituted an overbroad restraint on the freedom of expression. The state appealed.

Held, reversed and remanded. The Tennessee Supreme Court found that the purpose of statutes imposing criminal sanctions on persons who anonymously disseminate written statements about candidates for public office is to promote honesty and fairness in the conduct of election campaigns, and also to insure that voters will have information that will aid them in assessing the bias, interest, and credibility of the person or organization disseminating information about political candidates and in determining the weight to be given a particular statement. Noting that the legitimate purposes of the statute could not be accomplished by less restrictive means, the court concluded that the statute was not overbroad. State v. Acey, 633 S.W.2d 306 (1982), 19 CLB 78.

§ 53.05. —Speech

Georgia Defendant was indicted for criminally defaming two individuals during the radio talk show that he hosted. The statute defined criminal defamation as follows:

> [A] person commits criminal defamation when, without a privilege to do so and with intent to defame another, living or dead, he communicates false matter which tends to blacken the memory of one who is dead or which exposes one who is alive to hatred, contempt, or ridicule, and which tends to provoke a breach of the peace. A person convicted of criminal defamation shall be punished as for a misdemeanor.

The trial court denied defendant's demurrer and he brought an interlocutory appeal, contending, inter alia, that the statute violated his constitutionally protected right of free speech. The Georgia Supreme Court rejected defendant's argument and affirmed his conviction. A state, it said, may "constitutionally punish criminal defamation under carefully drawn statutes."

It is settled law, observed the court, that "demonstrable falsehoods" are not protected speech under the First Amendment; since the statute in dispute proscribed only defamatory falsehoods tending to provoke a breach of the peace, it did not infringe upon First Amendment guarantees. Williamson v. State, 293 S.E.2d 327 (1982), 19 CLB 174.

55. RIGHT TO JURY TRIAL

§ 55.00. In general

Court of Appeals, D.C. Cir. After defendant was convicted of murder and sentenced to life imprisonment, he filed a petition to vacate his sentence, alleging a denial of his right to trial by an impartial jury. His petition was based on the affidavit of a juror at his murder trial, stating that prior to the trial the juror had seen defendant in his cleaning store seven or eight

times and that this series of casual observations gave rise to the possibility that the juror possessed a subconscious memory of defendant that may have prejudiced him during the jury deliberations. The district court dismissed the petition.

Held, affirmed. The Court of Appeals for the District of Columbia Circuit found that the juror's affidavit as to a nonprejudicial "subconscious memory" that was unrecalled over ten years previously on voir dire cannot constitute a post hoc basis for a hearing to challenge a juror's competency. The court observed that mere allegations of the "possibility" of some undefined prejudice is completely speculative and not sufficient to trigger the right to a post-trial evidentiary hearing, especially where, as here, the juror's failure to disclose the relevant facts during voir dire was nonintentional. United States v. Brooks, 677 F.2d 907 (1982), 6 CLB 74.

57. RETROACTIVITY OF CONSTITUTIONAL RULINGS

§ 57.00. Self-incrimination

U.S. Supreme Court After purchasing a one-way airline ticket to New York City at Miami International Airport under an assumed name and checking two bags with false identification tags, the respondent was stopped by two detectives and produced, upon request, his airline ticket and a driver's license bearing his true name. Without returning his airline ticket or driver's license, the detectives asked him to accompany them to a small room and retrieved his luggage from the airline. While he did not respond to the detectives' request that he consent to a search of the luggage, respondent produced a key and unlocked one of the suitcases, in which marijuana was found. The detectives pried open the second suitcase and found more drugs. Following his conviction in Florida State Court, the Florida District Court of Appeal reversed.

Held, judgment affirmed. The Supreme Court ruled that while the respondent and his luggage were lawfully detained so they could verify or dispel their suspicions that he was a drug courier, the police exceeded the limits of an investigative stop where they asked the respondent to accompany them to a small police room, and retained his ticket and driver's license and indicated in no way that he was free to depart. Florida v. Royer, 103 S. Ct. 1319 (1983), 19 CLB 475.

58. PROHIBITION AGAINST UNLAWFUL SEARCHES AND SEIZURES

SCOPE AND EXTENT OF RIGHT IN GENERAL

§ 58.00. What constitutes a search

Nevada Defendant was charged with possession of cheating devices, slot machine "slugs." He moved to suppress the physical evidence on the grounds of an illegal search, arguing that the arresting officer's binocular-assisted observations of his activities violated his Fourth Amendment rights. At the hearing on defendant's motion, it developed that the officer saw defendant and another in a public alleyway in an area known for drug trafficking; suspecting that a drug transaction was occurring, the officer stepped from his vehicle and, through binoculars, saw defendant holding the slugs. As defendant entered a nearby gambling casino, the officer placed him under arrest. The trial court granted defendant's motion and the prosecution appealed.

Held, reversed and remanded. The Nevada Supreme Court reversed the trial court's order and remanded the case for trial, holding that the Fourth Amendment does not protect "what a person knowingly exposes to the public." Here, defendant was seen in a public place in possession of contraband by a police officer observing from a vantage point he had a right to use. The officer's use of binoculars to enhance his vision did not convert his otherwise unobjectionable observations into a prohibited search. State v. Barr, 651 P.2d 649 (1982), 19 CLB 390.

§ 58.10. Property subject to seizure

§ 58.20. —Abandonment

Court of Appeals, 2d Cir. After the defendants were convicted in the district court of violations of federal narcotics laws and conspiracy, they appealed on the ground that evidence seized from their trash cans had been improperly admitted into evidence.

Held, conviction affirmed on this point and reversed in part on other grounds. The Second Circuit found that the warrantless search of the defendants' trash bags over a six-month period by DEA agents did not violate their reasonable expectation of privacy. The court reasoned that, absent evidence indicating an intent by

the former owner to retain some control over or interest in discarded trash, his placement of it for collection on a public sidewalk is inconsistent with the notion that he retains a privacy interest in it. When plastic trash containers and their contents are carted to a public waste disposal area, the court noted, common experience teaches that the former owner obtains no implicit assurance that the trash will remain inviolate and free from examination. United States v. Terry, 702 F.2d 299 (1983), 19 CLB 478.

§ 58.30. —Automobile searches

U.S. Supreme Court After defendant was convicted in the district court of possession of narcotics with intent to distribute, the Court of Appeals for the D.C. Circuit reversed, holding that while the officers had probable cause to stop and search the car and its trunk without a warrant, they should not have opened either the paper bag or the leather pouch found in the trunk without first obtaining a warrant.

Held, reversed and remanded. The Supreme Court held that police officers who have legitimately stopped an automobile and who have probable cause to believe that contraband is concealed somewhere within it may conduct a warrantless search of the vehicle that is as thorough as a magistrate could authorize by warrant. The Supreme Court reasoned that since a magistrate may authorize a search of every part of the vehicle and its contents, including all containers and packages, that may conceal the object of the search, a warrantless search based upon probable cause may be just as extensive. The Court further found that since a search is not defined by the nature of the container in which the contraband is secreted, but by the object of the search and the places in which there is probable cause to believe it may be found, a search for narcotics may properly include luggage and other containers that may contain such contraband. United States v. Ross, 102 S. Ct. 2157 (1982), 19 CLB 70.

U.S. Supreme Court Defendant was the front-seat passenger in an automobile stopped for failing to signal a left turn. When two police officers approached and saw an open bottle of liquor on the floorboard, they placed defendant under arrest for possession of open intoxicants in a motor vehicle. The driver was also issued a citation for driving without a license. Before the car was towed away, a search revealed two bags of marijuana in the unlocked glove compartment. Further search revealed a revolver inside the dashboard. After defendant was convicted of possession of a concealed weapon, his motion for a new trial was denied. The Michigan Court of Appeals reversed, holding that the warrantless search of the car violated the Fourth Amendment. Certiorari was granted.

Held, reversed and remanded. The Supreme Court held that justification to conduct a warrantless search of a car stopped on the road does not vanish once the car has been immobilized. The Court reasoned that where police officers, after stopping a car, were justified in conducting an inventory search of the car's glove compartment, such discovery gave the officers probable cause to believe there was contraband elsewhere in the vehicle and to conduct a search thereof, even though both the car and its occupants were already in custody. Michigan v. Thomas, 102 S. Ct. 3079 (1982), 19 CLB 71.

Arizona Defendant, convicted of theft of a motor vehicle, argued on appeal that his Fourth Amendment rights against unreasonable search and seizure had been violated when his vehicle was stopped for investigation by a police officer. At a pretrial hearing, it was established that defendant, a young Mexican-American male, was stopped while driving a Ford pickup truck south toward Mexico. The arresting officer acknowledged that defendant had not been operating the vehicle improperly; rather, he had been stopped because the officer was "under the impression" from conversation with others in local law enforcement that numerous similar vehicles had been stolen and transported to Mexico by young Mexican-American males.

Held, conviction reversed and cause remanded. The Arizona Supreme Court stated that the facts sufficient to justify an investigating stop vary from case to case but must "raise a justifiable suspicion that the particular individual to be detained is involved in criminal activity." While investigatory stops have been justified because a driver and vehicle fit a particular statistical "profile," noted the court, the information relied on by the officer in this case fell far short of such a formal profile. State v. Graciano, 653 P.2d 683 (1982), 19 CLB 485.

§ 58.50. Search by private person

Montana Defendant, convicted of possession of dangerous drugs with intent to sell, argued

on appeal that his motion to suppress the physical evidence was erroneously denied.

The facts, established at a hearing on the motion, were uncontroverted. Defendant had rented a storage room from a warehouse-type facility, making individual units available to the public. Just prior to closing on the day in question, defendant arrived at the facility and went to his unit. Shortly thereafter, the facility's manager, intending to close, went to defendant's unit to determine how long defendant would be on the premises.

The manager opened the door to defendant's unit when there was no response to her knock and calls; defendant was seated on the floor, pointing a gun at the door, in front of two suitcases. Defendant left immediately.

The manager consulted her superiors, who told her to determine the contents of the suitcases. She then entered defendant's unit by removing the door hinges, opened the suitcases, and discovered numerous bottles containing pills. Police were advised and obtained a search warrant; the ensuing search resulted in the seizure of over 100 bottles of pills and defendant was apprehended, charged, and convicted.

Held, conviction reversed. The Montana Supreme Court adhering to its position that as a matter of state constitutional law, "evidence obtained by a private citizen in violation of another's constitutional rights is subject to the exclusionary rule and may not be admitted into evidence in a criminal trial in this state."

Here, the search warrant was tainted by evidence unlawfully obtained by the manager; accordingly, the fruits of the search were subject to the exclusionary rule, said the court, expressing its view that:

> To sanction the admission of the evidence gained in this unlawful manner by allowing its presentation in a criminal trial makes the courts of the state a party to violations of the constitutional rights of the defendant and runs afoul of any viable notion of judicial integrity. . . .

State v. Van Haele, 649 P.2d 1311 (1982), 19 CLB 268.

BASIS FOR MAKING SEARCH AND/OR SEIZURE

§ 58.75. Search warrant

§ 58.100. —Necessity of obtaining a warrant

Florida Defendants, convicted of conspiracy and delivery of cocaine, argued on appeal that the trial court erroneously refused to order suppression of the physical evidence.

Defendants Lawrence and Griffin met with undercover police officers at Griffin's residence to conclude a previously arranged cocaine sale. During the transaction, one of the officers left, ostensibly to get a scale and money from his car; he returned with several other drug enforcement agents and all entered the house, arrested defendants, and seized the contraband.

The officers had no arrest warrant or search warrant; defendants contended that the officer, having left the premises, could not lawfully reenter with reinforcements for the purpose of arrest and seizure without a warrant and without complying with state "knock-and-announce" requirements.

Held, convictions affirmed. The Florida Supreme Court found that the officer had implied consent to reenter, with others if he chose, and that consent was not vitiated because it was obtained through deception. Defendants, it said, were "victims of their own misplaced trust."

Since reentry was consensual and, in any event, a felony had been committed in the officer's presence, no warrant was required, the court held. However, it did caution:

> In holding that the agent had permission to reenter the home, we do not mean to suggest that once the authorities have been admitted to a residence they have carte blanche to return and enter at their own will. What we are saying is that under the facts of this particular case, the authority to reenter was implicit. The agent left the house for a very short period of time, his return was expected and encouraged, and his return was a necessary part of the uncompleted, ongoing transaction pursuant to which he had first been invited.

Griffin v. State, 419 So. 2d 320 (1982), 19 CLB 270.

Illinois Defendant, convicted of possessing LSD, argued on appeal that suppression of the contraband was proper because it was seized pursuant to an unlawful, warrantless search of his hotel room. At the suppression hearing, it had been established that police received information that defendant was selling drugs from his hotel room. An informant was sent to the room to make a "buy"; the informant and defendant had a conversation, overheard through

the partially open door by officers stationed in the hallway. When defendant confirmed that he had drugs for sale, police entered the room, effected defendant's arrest, and seized the LSD from his person. The trial court denied defendant's motion to suppress. That ruling was reversed, following defendant's conviction after jury trial, by the intermediate appellate court. The state then appealed.

Held, conviction sustained and motion to suppress denied. The Illinois Supreme Court recognized that, as a matter of state constitutional law, hotel residents enjoy the same protection against unreasonable intrusion as residents of private homes. It followed, said the court, that the holding of Payton v. New York, 445 U.S. 573, 100 S. Ct. 1371 (1980), "that a warrantless nonconsensual entry into a suspect's home to make a routine felony arrest is violative of the fourth amendment absent exigent circumstamces" applies equally to an hotel room occupant.

The court proceeded to find exigent circumstances justifying the warrantless entry, stating:

> [T]he fact that the officers reasonably believed that a felony was being committed in their presence demanded prompt police action and constituted an exigent circumstance which justified the warrantless entry into the hotel room and the arrest.

People v. Eichelberger, 438 N.E.2d 140 (1982), 19 CLB 182.

Kansas Defendant, convicted of murder, argued on appeal that the trial court erred in refusing to suppress a ring which was taken from his person at the time of arrest and subsequently introduced into evidence at his trial.

The ring was worn by defendant when arrested and was among the items of personal property taken and inventoried for safekeeping at the jail prior to his incarceration. Two and one-half months later, police removed the ring from the property envelope for examination.

At trial, a pathologist testified that certain bruises on the deceased's face could have been caused by the ring. Defendant argued that the failure by police to obtain a search warrant prior to removing the ring from the property envelope amounted to an illegal search and seizure.

Held, affirmed. The Kansas Supreme Court, while noting a division of authority on the point, held "when an accused has been lawfully arrested and is being held in custody, the personal effects in his possession at the time and place of his arrest may lawfully be searched, inventoried, and placed in safekeeping by the police without a search warrant when the search and seizure is incidental to the arrest. Thereafter, although a substantial period of time may have elapsed since the administrative processing, a "second look" at the inventoried personal effects may be obtained without a search warrant, and any property which is relevant for use as evidence in the accused's trial may be removed from the place of safekeeping." State v. Costello, 644 P.2d 447 (1982), 19 CLB 84.

§ 58.105. Search incident to a valid arrest

§ 58.120. —Manner of making arrest or entering premises as affecting validity of subsequent arrest or search

U.S. Supreme Court Defendant was arrested on a federal charge by Secret Service agents who had entered his home without an arrest warrant. Subsequently, this Court in Payton v. New York, 445 U.S. 573, 100 S. Ct. 1371 (1980), held that the Fourth Amendment prohibits the police from making a warrantless and nonconsensual entry into a suspect's home to make a routine felony arrest. After the district court denied his motion to suppress the evidence, he was convicted at trial. When his case was on direct appeal, *Payton* was decided and the Ninth Circuit reversed the conviction, holding that *Payton* applied retroactively.

Held, affirmed. A decision of this Court construing the Fourth Amendment is to be applied retroactively to all convictions that were not yet final at the time the decision was rendered, except where a case would be clearly controlled by existing retroactivity precedents. The Court found that this case did not fall within this exception since *Payton* did not apply already settled precedent to a new set of facts or announce an entirely new and unanticipated principle of law. United States v. Johnson, 102 S. Ct. 2579 (1982), 19 CLB 68.

ELECTRONIC EAVESDROPPING

§ 58.135. In general

U.S. Supreme Court After an owner of a private cabin moved to suppress evidence based on the warrantless monitoring of a beeper, the cabin-owner was convicted in the district court of conspiring to manufacture controlled sub-

stances. The Eighth Circuit reversed the conviction.

Held, reversed. The Supreme Court concluded that the monitoring of the signal of a beeper placed in a container of chemicals that was being transported to the owner's cabin did not invade any legitimate expectation of privacy and, therefore, was neither a "search" nor a "seizure" within the scope of the Fourth Amendment. The Court reasoned that since the beeper surveillance amounted principally to following an automobile on public streets, a person traveling in the automobile has no reasonable expectation of privacy as to his movements. The Court further observed that while the respondent had the traditional expectation of privacy within his dwelling, such expectation of privacy did not extend to visual observations from public places of the automobile arriving at his premises or the movement of the container outside the cabin. United States v. Knotts, 103 S. Ct. 1081 (1983), 19 CLB 476.

§ 58.145. —Recording devices

Court of Appeals, 11th Cir. After defendant was found guilty of conspiracy to possess marijuana with intent to distribute, he appealed on the ground that a tape recording was improperly admitted into evidence.

Held, conviction affirmed. The Eleventh Circuit stated that a recording made with a device placed in a room where one of the parties to the conversation has consented to the recording does not constitute an illegal search and seizure. In so ruling, the court found it immaterial that the person with whom the defendant had a conversation did not have a recording device implanted on his person, but rather, such device was concealed in the room. The court observed that in either case the defendant does not have a reasonable expectation of privacy, and that a constitutionally protected expectation of privacy does not attach to a wrongdoer's misplaced belief that the person to whom he voluntarily confides his wrongdoing will not reveal it. United States v. Yonn, 702 F.2d 1341 (1983), 19 CLB 481.

§ 58.155. Procedure for suppressing fruits of eavesdropping

Court of Appeals, D.C. Cir. After defendants were convicted in the district court for narcotics violations, they appealed on the ground that the electronically obtained evidence should have been suppressed.

Held, affirmed. The District of Columbia Circuit concoluded that failure of the Assistant U.S. Attorney to obtain written authorization of the U.S. Attorney did not require suppression of the fruits of the wiretap even though the statute called for such written authorization. The court observed that it was conceded by defendants that the U.S. Attorney had actually authorized the wiretap applications and that the Assistant U.S. Attorney had sought and received authorization of two Assistant Attorneys General who had been specifically designated to approve federal wiretap applications. The court thus rejected the contention that oral authorization by the U.S. Attorney amounts to no authorization at all; instead, the court concluded that the written requirement was no more than a reporting requirement. United States v. Johnson, 696 F.2d 115 (1982), 19 CLB 378.

SUPPRESSION OF EVIDENCE
IN GENERAL

§ 58.200. Standing

Illinois Defendants were charged with the theft of motor vehicles and related charges; they moved to suppress the physical evidence on the ground that police officers unlawfully entered the garage where the vehicles were located without probable cause and in the absence of exigent circumstances justifying a warrantless search and seizure. At a consolidated suppression hearing and bench trial it was established that police officers saw defendants exit the garage, which the officers believed to be vacant. When the officers approached, defendants fled. They were apprehended a short distance away and brought back to the garage for investigation. Police then inspected the premises for additional persons and observed a number of cars, later determined to be stolen, and in the process of being dismantled.

Defendants' motion was denied summarily, without argument from the state, and they appealed from their subsequent convictions, raising the same Fourth Amendment issues. The state argued, for the first time, that defendants lacked standing to object to the search because they had claimed no propriety or possessory interest in the garage and hence had no legitimate expectation of privacy in the premises. The intermediate appellate court found for defendants and reversed, holding that by not raising the standing issue before the hearing court, the state had waived the issue for purposes of appeal.

Held, reversed. The Illinois Supreme Court found that defendants had no standing to challenge the search of the garage and that the state had not waived its right to raise the issue. Defendants, said the court, did not own or lease the garage and presented no evidence that they were legitimately on the premises; accordingly, they could assert no Fourth Amendment rights or claim that they had any legitimate expectation of privacy in the garage. The state had not waived the issue, explained the court, because defendants had not claimed an expectation of privacy in the premises at the hearing; thus, there had been no standing issue to address. Rather, it continued, the state had prevailed without argument on the Fourth Amendment issues raised by defendants. As the state had not asserted or acquiesced in a contrary position below and, indeed, had no need to address the issue below, the court concluded that the state should not have been precluded from arguing on appeal that defendants lacked standing. People v. Keller, 444 N.E.2d 118 (1983), 58 CLB 483.

59. PROHIBITION AGAINST SELF-INCRIMINATION

SCOPE AND EXTENT OF RIGHT IN GENERAL

§ 59.05. Witness's assertion of privilege

§ 59.10. —Basis for asserting privilege

U.S. Supreme Court In a civil antitrust case in the district court, a nonparty deponent was held in contempt for asserting his Fifth Amendment privilege against self-incrimination in response to questions read verbatim from or closely tracking transcripts of his previously immunized testimony before the grand jury. The Seventh Circuit reversed, holding that deponent was entitled to assert his Fifth Amendment privilege, since his deposition testimony was not protected under 18 U.S.C § 6002 but could be used against him in a subsequent criminal action.

Held, affirmed. The Supreme Court found that a deponent's civil deposition testimony tracking his prior immunized grand jury testimony is not, without duly authorized assurance of immunity at the time, "immunized testimony" within the meaning of the use immunity statute, and therefore may not be compelled over a valid assertion of the Fifth Amendment privilege. The Court reasoned that user immunity was intended to immunize and exclude from a subsequent criminal trial only that information to which the government expressly has surrendered future use. Pillsbury Co. v. Conboy, 103 S. Ct. 608 (1983), 19 CLB 373.

§ 59.20. Silence as an admission

Pennsylvania Defendant was convicted of manslaughter for shooting the victim, Hilton, to death during a barroom fight. He claimed that the shooting was in self-defense. At trial, defendant testified that he had wrested the gun away from Hilton and began to run from the scene when a third party shot at him; defendant stated that he then fired the gun, over his shoulder, at the third party but the bullet struck Hilton. No other defense witness offered an exculpatory account of the shooting. Defendant had made no statement to police at the time of his arrest and, on cross-examination, was questioned about his failure to inform police of his self-defense claim. Defense counsel objected and moved for a mistrial; the objection was sustained and the jury instructed to disregard the question, but a mistrial was denied. Defendant contended on appeal that it was reversible error to deny his motion for a mistrial.

Held, sentence vacated and remanded for a new trial. The Pennsylvania Supreme Court, while noting that under Fletcher v. Weir, 455 U.S. 603, 102 S. Ct. 1309 (1982), it is constitutionally permissible to cross-examine a defendant about his post-arrest silence when the silence occurred prior to the giving of *Miranda* warnings, it declined to follow that decision as a matter of state law. The court remarked that "there exists a strong disposition on the part of lay jurors to view the exercise of the Fifth Amendment privilege as an admission of guilt." Accordingly, it decided "the Commonwealth must seek to impeach a defendant's relation of events by reference only to inconsistencies as they factually exist, not to the purported inconsistency between silence at arrest and testimony at trial. Silence at the time of arrest may become a factual inconsistency in the face of an assertion by the accused while testifying at trial that he related this version to the police at the time of arrest when in fact he remained silent. . . . Absent such an assertion, the reference by the prosecutor to previous silence is impermissible and reversible error." Refusing to find the error harmless, the court remanded for a new trial. Commonwealth v. Turner, 454 A.2d 537 (1982), 19 CLB 489.

NONTESTIMONIAL ASPECTS

§ 59.75. Drunk driving tests

U.S. Supreme Court When respondent was arrested by police officers in South Dakota for driving while intoxicated, he refused to submit to a blood-alcohol test even though he was warned that such refusal would lead to the automatic revocation of his license. The South Dakota trial court granted respondent's motion to suppress all evidence of his refusal to take the test, and the South Dakota Supreme Court affirmed.

Held, reversed and remanded. The Supreme Court stated that admission into evidence of defendant's refusal to submit to a blood-alcohol test does not offend his privilege against self-incrimination. In so finding, the Court observed that it would not be fundamentally unfair in violation of due process to use defendant's refusal to take a blood-alcohol test as evidence of guilt, even though the police failed to warn him that refusal could be used against him at trial. South Dakota v. Neville, 103 S. Ct. 916 (1983), 19 CLB 476.

60. RIGHT TO SPEEDY TRIAL

§ 60.00. In general

New Hampshire Defendant, convicted of robbery and assault, argued on appeal that his constitutional right to a speedy trial had been violated by the nineteen-month delay between his arrest and trial. A three-month portion of the delay was the direct result of the complaining witness's departure from the country. The prosecutor, in anticipation of the complainant's absence for that period, had unsuccessfully attempted to bring the case to trial earlier. Trial did not commence until six months after the complainant returned, immediately upon defendant's first assertion of his speedy trial rights before the trial court.

Held, conviction affirmed. The New Hampshire Supreme Court stated that the right to a speedy trial "is necessarily relative and must be considered with regard to the practical administration of justice." In determining whether a defendant's speedy trial rights are violated by a delay between arrest and trial, said the court, the factors for consideration are "the length of the delay, whether the defendant asserted his right, and any prejudice to the defendant."

Here, it found, the state had attempted to move the case for trial in a reasonably prompt fashion; thereafter, the case could not be tried because of the complainant's voluntary absence and not because of a deliberate prosecution effort to delay. Further, defendant did not diligently pursue his rights, waiting nineteenth months before making any claim, and failed to cite any specific prejudice resulting from the delay. Under all of the circumstances, it concluded, there had been no denial of defendant's speedy trial rights. State v. Perron, 454 A.2d 422 (1982), 19 CLB 489.

New York Defendant was convicted, in 1975, of multiple counts of possession and sale of a controlled substance. He appealed on the ground that his right to a public trial had been violated when, without a hearing, the courtroom was cleared of spectators and closed prior to the testimony of the undercover investigator to whom he had allegedly sold drugs. In 1980 the intermediate appellate court reversed and ordered a new trial.

On remand to the trial court, he contended, inter alia, that the five-year delay between his conviction and the appellate court's decision violated his constitutional rights to a speedy trial. The trial court denied his motion and he entered a plea of guilty to one count of the indictment in satisfaction of all pending charges. Defendant again appealed, arguing in substance that because his right to a public trial had been violated initially, he would not have received the trial guaranteed him by the Constitution, i.e., his "first fair trial," until more than five years after his arrest; a trial scheduled five years after the inception of the criminal proceeding, he asserted, could not be a "speedy trial" in the constitutional sense.

Held, conviction affirmed. The New York Court of Appeals concluded that "the underlying rationale of the Sixth Amendment's right to a speedy trial extends that right only until the accused is brought to trial. The fact that, on appeal, the defendant may successfully challenge the propriety of that trial does not extend the Sixth Amendment's guarantee of a speedy trial throughout the appellate process. When the accused is found guilty and incarcerated even as a result of a procedurally flawed trial, he can no longer be said to be in the 'legal limbo' the Sixth Amendment is designed to protect against. The accusations raised against him have been supported and the anxiety of an unknown fate has been resolved. The fact that a state has chosen statutorily to provide the accused with additional protection in the form of appellate review does not serve to expand the scope of an accused's speedy trial right. Nor

does it mean that the purposes behind the speedy trial right will not be served properly. The accused will have been afforded the protections envisioned in assuring that he will be promptly brought to trial." Here, stated the court, defendant was afforded a prompt initial trial which resulted in his conviction; "at that point, the concerns addressed by the Sixth Amendment were served." Accordingly, it found no violation of defendant's constitutional right to a speedy trial. People v. Cousart, 444 N.E.2d 971 (1982), 19 CLB 482.

§ 60.20. Reason for delay

Colorado Defendant was arrested for menacing and attempted kidnapping on April 24, 1981 and arraigned on those charges on April 28. Trial was set for July 7, then reset to September 8 on the state's motion. On July 23, defense counsel was permitted to withdraw because he had been unable to obtain defendant's cooperation; a public defender was appointed and, because of his unavailability on September 8, the trial was rescheduled to begin on October 13.

Defendant failed to appear on October 13 and a bench warrant was issued. Defendant appeared on November 13; the warrant was vacated and a trial date of December 1 was set. On December 1, defendant moved for dismissal, arguing that failure to bring him to trial within six months of his arraignment violated statutory speedy trial requirements.

The trial judge granted defendant's motion, stating that only the one-month period of delay resulting from defendant's actual absence could be excluded from the speedy trial period; the speedy trial period began to run again on November 13 and expired on November 28, the judge found, in holding the defendant was entitled to dismissal.

Held, ruling of district court dismissing charges against defendant reversed and remanded. The Colorado Supreme Court ruled that the trial judge should have excluded from the speedy trial period "not only [the] time of the defendant's actual absence or unavailability but also [any] additional period of delay that may be fairly attributable to the defendant as a result of his voluntary unavailability."

It was defendant's failure to appear on October 13 that precipitated the delay, said the court, and there was no suggestion in the record that a trial date earlier than December 7 could have been set "consistent with sound principles of judicial administration." The court also noted that defendant alleged no prejudice or disadvantage resulting from the period of delay; under the circumstances, it concluded, dismissal would "undermine the general societal interest in effective enforcement of the laws and would be inconsistent with the intent of the speedy trial provisions that a just result be accomplished." Accordingly, the court reversed and reinstated the charges against defendant. People v. Sanchez, 649 P.2d 1049 (1982), 19 CLB 274.

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